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AFFILIATION

Affiliation order – application for variation under Magistrates' Courts Act 1980, s. 60 – no power to vary the periodical payment provision of an order made before February 1, 1981 so as to make the money payable to the child direct instead of to the mother.

An affiliation order made in 1975 under the Affiliation Proceedings Act 1957, s. 4, required periodical payments to the mother for the child's maintenance. In 1981 the mother applied for a variation as to the amount payable and also, to achieve a tax advantage, to require payments to be made to the child himself instead of to her. A stipendiary magistrate refused the latter part of the application and the mother appealed against his refusal.

Held: When the affiliation order was made in 1975 there was no power to order payment to the child himself. Although from the effective date of the amendment of the Affiliation Proceedings Act 1957, s. 5(1) by the Domestic Proceedings and Magistrates' Courts Act 1978, s. 51(1) (February 1, 1981) a new affiliation order could require payment in that way, an order first made before that date remains subject to the limitations which operated at that time. Such a provision could not be included at that time, and the order cannot be varied in that way now. Appeal dismissed.

Boniface v. Harris Fam. Div. 208

Affiliation order – mother dissatisfied with amount of order – availability of appeal to Crown Court – Affiliation Proceedings Act 1957, ss. 4 and 8.

Upon the mother's application a magistrates' court made an affiliation order. The mother wished to appeal by cases stated against the amount of periodical payment included in the order, but the justices refused her application for a case. She sought an order of mandamus to require the justices to state a case.

Held: The application was misconceived. The mother's appeal against the amount of the order should be to the Crown Court.

Oldfield v. National Assistance Board (1960) 124 J.P. 246, [1960] 1 All E.R. 524, Q.B.D., followed:

R. v. Ipswich Crown Court, ex parte Smith (1979) 143 J.P. 586, Q.B.D., distinguished.

Application refused.

R. v. Hereford Justices. Ex parte Oliver Q.B.D. 140

CHILDREN AND YOUNG PERSONS

Care proceedings – definition of "residence" for purposes of determining the responsible local authority – no doctrine of constructive residence.

A child was born at St. Mary's Hospital in the city of Manchester. Within hours of the birth, the social services department obtained a place of safety order and the child was placed short term with foster parents who resided within the area of the Oldham metropolitan borough council. The parents lived within the area of Salford city council. Care proceedings were commenced in the Manchester juvenile court and the court made an interim care order to Salford city council. Salford was chosen because the magistrates decided that the only "residence" of the child at that stage was that of the parents. Salford city council applied for judicial review.

Held: The magistrates were wrong to decide as they did, because there is no doctrine of constructive residence for these purposes. The order could only have been made to Salford city council if the child had actual residence within that area. The application was granted and an order for certiorari made to quash the order of the magistrates.

R. v. Manchester City Magistrates' Court.
Ex parte Bannister Q.B.D. 516

Care proceedings pending – application for wardship – jurisdiction of High Court – when to intervene – is supervision of statutory scheme appropriate?

The county council obtained place of safety orders in respect of three children and instituted care proceedings. The day before the juvenile court hearing, the parents made an application to the High Court asking for an order that the children be made wards of court and that care and control should be committed to the mother, with supervision to the county council. The county council argued that the decision in *A. v. Liverpool City Council* (1981) 145 J.P. 318; [1982] A.C. 363 meant that the High Court did not have, or at any rate should not exercise, jurisdiction in wardship in a case of this nature. The mother argued that the High Court should intervene because:

1. the juvenile court did not possess the same wide powers of the High Court to make provision for, or control, a phased return to the parent or an experimental period of increasing contact by way of access;
2. it was unfair if the High Court would intervene at the instigation of a local authority (to overcome perceived defects in the powers available in care cases) but not at the instigation of parents;
3. an order of the High Court under s. 7 of the Family Law Reform Act would better serve the interests of the children.

Held: Although the jurisdiction of the High Court in wardship is not ousted if care proceedings are taking place or a care order is in force, the High Court will rarely intervene because the responsibility for taking decisions relating to the welfare of children in such cases has clearly been vested by Parliament in juvenile courts and (if orders are made) in local authorities.

Per curiam: If there are defects in the legislation relating to care proceedings, the remedy is for Parliament, if it thinks it appropriate, to provide the necessary powers.

Re "E" Minors C.A. 321

CONSUMER PROTECTION

Bargain Offers – sale – whether previous higher price must be indicated on statement that goods are being offered at lower price – whether previous higher price must be genuine – Price Marking (Bargain Offers) Order 1979.

The appellants indicated on a display card that an electric cooker was for sale by retail in the following terms: "Comet January Sale . . . Sale Price £194.90". A second display card in respect of a refrigerator read: "Comet January Sale . . . Sale Price £64.50." Informations were laid in respect of both statements in that they infringed art. 2 of the Price Marking (Bargain Offers) Order 1979 and para. 5(1) of the schedule to the Prices Act 1974. Articles 2 and 3 of the Order prohibit in general terms any statement that the price at which goods are being offered is lower than another price subject to exceptions contained in art. 3. Inter alia, this allows statements comparing a price with a previous price when the person giving the price indication compares his price with a particular price which he proposes to charge or has charged in the ordinary course of business on the same or other identified premises. The prosecution alleged that the statements contravened the Order on two grounds. First, that it was a requirement of the Order that the higher price must be recorded on the statement which indicates the goods are being offered at a lower price. Secondly, that for the appellants to be entitled to rely on the exception in art. 3 it had to be shown that the particular previous price had actually been charged on the same or other identified premises. On appeal:

Held: dismissing the appeal; 1. That the statements in question did not offend against the Order merely because the particular price was not mentioned in the indication, "particular" in this context means no more than special as opposed to general;

2. That to bring himself within the exception in the Order a trader must compare his present price with a genuine and not a fictitious price. If he relies on a past price he has to show that he has actually done business at that price and not merely that he has offered the article at a price at which no-one was prepared to buy. This the appellants had failed to establish.

Comet Radiovision Services Ltd. v. Williamson Q.B.D. 444

Consumer Protection Act 1961 – ss. 2 and 3 – shoe repairer – whether sale of second-hand electric fire a sale otherwise than in the course of business.

The respondent, a shoe repairer, was charged under s. 2 of the Consumer Protection Act 1961 with a breach of regulations made under that Act in respect of the sale of a second-hand electric fire. Section 2(3) of the 1961 Act states that section does not apply where the seller sells the goods otherwise than in the course of a business. The fire in question had come from the respondent's home but was

displayed for sale with other second-hand items on his business premises. The monies he received for the fire did not go through the books of the business. The stipendiary magistrate accepted the respondent's argument that the sale was otherwise than in the course of business and dismissed the informations. On appeal:

Held: allowing the appeal, the sale itself was simply a sale of goods displayed in the shop along with other goods which the respondent was selling in the course of his secondary line of business and there was nothing to differentiate the goods in question from the other goods which were being sold in the course of the secondary business; consequently the magistrate had erred in law.

London Borough of Southwark v. Charlesworth (J.J.) Q.B.D. 470

CRIMINAL LAW

Allegations against prosecution witnesses – Section 1(f)(ii) of the Criminal Evidence Act 1898 – discretion of Judge to allow defendant to be examined on previous convictions.

The appellants were convicted at Croydon Crown Court on November 6, 1981, of burglary, and sentenced to four years' imprisonment each. It was alleged that they gained entry to the home of an elderly woman by posing as water board employees, and had broken into a bureau, although nothing was taken. The victim failed to identify the appellants and the prosecution case consisted of extensive statements made while in police custody by the appellants. In view of the difficulties imposed on challenging these statements, under s. 1(f)(ii) of the Criminal Evidence Act 1898, Britzman and his counsel refrained from making specific allegations of misconduct but suggested that the statements had never been made or had been misheard. The recorder ruled that the prosecution could cross-examine Britzman about previous convictions, on the basis that the only real inference was that the officers had fabricated the evidence.

Held: Although the defence avoided direct imputations on the character of the witnesses, such allegations must be reasonably inferred from the nature of the defence. Aware of the difficulties faced by defendants in such cases, the court set out guidelines for the exercise of the Judge's discretion in favour of the defendant where s. 1(f)(ii) of the Criminal Evidence Act was involved:

1. Where the defence was a mere denial of an incident however emphatic;
2. Where there is a possibility of mistake, misunderstanding or confusion as an alternative explanation for the disputed evidence brought by the prosecution;
3. Where the evidence is overwhelming and there is no need for the prosecution to rely on s. 1(f)(ii);
4. Allowance should be made for a defendant who makes exaggerated allegations under stress in giving evidence, particularly where lead into making such imputations by the prosecution in cross-examination.

The appeal against conviction was accordingly dismissed.

R. v. Britzman and Hall C.A. 531

Assault on police officer in the execution of his duty – whether police officer attempting to restrain a defendant who is resisting an unlawful

search of himself by another police officer is acting in the execution of his duty.

The appellant was approached by two police officers who asked him for his name and address which he refused to give them. He also refused to empty his pockets on the request of one of the officers who then moved forward to search the appellant without informing him of the reason for the search. The appellant resisted the search and in the ensuing struggle the police officer's tunic was torn. The second officer then intervened to prevent a breach of the peace and was head butted by the appellant, who was then charged with two offences, one of criminal damage to the first officer's tunic and the other of assaulting the second officer when in the execution of his duty. The stipendiary magistrate dismissed the first charge being of opinion that the damage to the tunic was caused by the appellant in the course of his using reasonable force to repel the officer's unlawful search, but convicted the appellant of the second offence on the basis that after the damage had occurred, the second officer in attempting to restrain the appellant and prevent a further breach of the peace was acting in the execution of his duty at the time he was head butted by the appellant. On appeal by case stated against conviction:

Held: On the question whether the second officer who was assaulted was acting in the execution of his duty it was necessary to ask whether there was a breach of the peace. On the facts of the present case the appellant, not having been told the reason for the search, was doing nothing unlawful in using reasonable force to repel the search by the first officer and the second officer could not be said to be acting in the execution of his duty in attempting to restrain him.

Quaere: Whether had the appellant been charged with common assault on the second officer he could have been rightly convicted of that offence.

McBean v. Parker Q.B.D. 205

Automatism – "self-induced" hypoglaecemia – whether sufficient element of recklessness to establish mens rea in offences of basic intent.

The appellant was convicted at Bolton Crown Court on October 14, 1982, under s. 18 of the Offences Against the Person Act 1861, of wounding with intent; the jury were not required to give a verdict on an alternative count under s. 20, of unlawful wounding. The offence concerned an attack by the appellant on a friend of a woman with whom the appellant had previously been living.

The appellant, a diabetic, raised a defence of automatism by reason of hypoglaecemia caused by taking insufficient food after a dose of insulin. At the trial, the recorder directed the jury that the condition raised in this defence was self-induced and therefore could not amount to automatism, relying on *R. v. Quick* (1973) 137 J.P. 763; (1973) 57 Cr. App. R. 722 at p. 735 where Lord Justice Lawton said, ". . . A self-induced incapacity will not excuse . . . nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something".

Held: Automatism as a result of a voluntary act such as taking alcohol or dangerous drugs does not negative mens rea for crimes of basic intent because the inherent recklessness in such conduct is sufficient to constitute mens rea, except in offences requiring proof of specific intent. There is, however, a material distinction between taking alcohol or dangerous drugs, and failing to take food after insulin, in order to avert hypoglaecemia. Knowledge of the probable effects of such voluntary action would be necessary if it were to amount to recklessness and there

was no proof that the appellant knew of the effects or that they were common knowledge. The passage cited in *Quick's* case was obiter and not intended to lay down an absolute rule, and later in that judgment considerations which might amount to a valid defence were considered.

Self-induced automatism, other than that brought about by alcohol or dangerous drugs, may be a defence to crimes of basic intent unless the prosecution can prove the necessary element of recklessness. In this case, if the appellant knew his actions would make him aggressive or uncontrolled with a possibility of injuring someone, the jury may find he was reckless. The recorder failed to direct the jury as to the elements of recklessness. Notwithstanding this, there was considerable evidence of which the jury, properly directed, would have come to the same conclusion. Accordingly no miscarriage of justice occurred and the appeal is dismissed.

R. v. Bailey C.A. 558

Bankers' Books Evidence Act 1879 - admissibility of letters - no extension of categories.

On April 20, 1982, the appellant was convicted at the Crown Court, Newington Causeway, on three counts of obtaining money by deception and four counts of obtaining a pecuniary advantage by deception. The offences, under s. 15(1) of the Theft Act 1968, consisted of falsely issuing cheques as good and valid orders, and the offences under s. 16(1) related to the unauthorized use of a cheque card when issuing cheques to increase his overdraft.

The recorder had admitted, under the terms of s. 9 of the Bankers' Books Evidence Act 1879, two letters from a bank employee to the appellant. The writer was not called as a witness and there was no evidence of their receipt by the appellant. The letters comprised the evidence that the appellant knew he was not authorized to have an overdraft and this aspect was stressed in the recorder's summing-up to the jury.

Held: The Bankers' Books Evidence Act 1979 lists in s. 9 specified documents from which copy extracts are admissible as evidence, where they are the ordinary **books of the bank and the entry was made in the ordinary course of business. The** letters are not within the clearly expressed provisions of the Act: they are not "bankers' books" and were therefore inadmissible. In addition, they should not have been treated, in the summing-up, as material evidence to prove the required element of false and dishonest representation. Other evidence showed no more than the appellant's knowledge that his accounts were overdrawn. Accordingly the appeal was allowed and the convictions quashed.

R. v. Dadson C.A. 509

Bind over - power to impose conditions - validity of consent where obtained as alternative to custodial sentence.

On February 8, 1982, the appellant, then aged 18 years, was convicted at Croydon Crown Court of two counts of theft. Since 1979 he had acquired a considerable number of convictions and in view of this and the serious nature of the offences before the court, the Judge made it clear that he was considering imposing a sentence of borstal training. Counsel for the appellant explained that

the appellant's mother had arranged for him to accompany her to Jamaica, where it was hoped he would make a fresh start. The Judge therefore proposed to bind over the appellant in his own recognizance of £20 on condition that he accompanied his mother to Jamaica within 10 days and not return to this country for five years. The appellant was reluctant to agree to the conditions since he had never lived in Jamaica, and his mother, on whom he was dependant, might have to return to England as her husband must remain here on account of ill health. It was explained to him that the alternative was a custodial sentence and on this understanding he consented to the order.

Held: 1. On a question of jurisdiction to consider an appeal against "sentence," s. 50(1) of the Criminal Appeal Act 1968 includes any order made by a court in dealing with an offender, and on this definition the Court of Appeal has power to deal with a bind over.

2. The Crown Court has power when binding over a convicted person to impose a term requiring the defendant to leave the jurisdiction for a period, subject to the defendant's consent. Such consent will not be vitiated merely because he is told the alternative is a custodial sentence. However, it will be appropriate to impose such conditions in very few cases, and generally only to ensure the defendant returns to a country of which he is a citizen, where he habitually resides or where there are special circumstances for which that country will take him for his wellbeing. The appellant is British by birth and upbringing, and it is probable his mother would not be able to remain in Jamaica throughout the five year period. Therefore, in the circumstances of this case, the conditions were not appropriate and the order is set aside.

3. In reviewing the sentence, the court must take account of the limitations imposed in s. 11(3) of the Criminal Appeal Act 1968, and in these circumstances, and in view of the social inquiry report which suggests an improvement in the appellant's behaviour, a sentence of 12 months' conditional discharge was substituted for the original order.

R. v. Williams C.A. **273**

Breach of requirement of community service order – formal proof necessary – power of court to allow prosecution alleging breach to call further evidence after they have closed their case and the defence have made a submission of no case to answer.

The applicant, Neville Green, was charged before a magistrates' court on two summonses alleging that during two separate periods he had been in breach of the requirements of a community service order. The only prosecution witness called gave evidence that the applicant had failed to attend for work on one day in the first period, and having then been shown by the defence a letter from the applicant's doctor confirming that the applicant had had a hospital appointment that day, the prosecuting probation officer closed her case. On a submission by the defence that there was no case to answer, the justices decided to permit the prosecuting officer to re-open her case and following further evidence given by the witness and by the prosecuting officer herself, the justices found the applicant guilty on both summonses and sentenced him to two months' imprisonment. On application for judicial review:

Held: It was clear from s. 16(3) of the Powers of Criminal Courts Act 1973 that formal proof was required of a breach of a community service order and accordingly the ordinary rules relating to the presentation of the prosecution's case and the circumstances in which it was permissible to allow the prosecution to call further evidence after they had closed their case, applied. The general principle was

that when the prosecution had closed their case they must stand or fall on the evidence they had produced and it was only in exceptional circumstances that there was a discretion in the court to allow the prosecution to call further evidence. This case did not fall within the exceptional circumstances and the application would be allowed and the conviction quashed.

R. v. Gainsborough Justices. Ex parte Green Q.B.D. 434

Breach of the peace – misbehaviour by group of youths when only police officers present – relevant considerations in deciding whether conduct likely to cause a breach of the peace.

Around midnight on Good Friday, April 9, 1982, two police officers in a police car saw the three respondents and another youth dancing, singing and abusing one another. When the car stopped, the respondent, Jones, swore at the officers and assaulted one of them and was arrested. Thereafter the respondent, Coleman, used abusive language and on being arrested struck one of the officers, whereupon the third respondent, Smith, swore at the police and tried to release Coleman. Jones and Coleman were each charged with assaulting a police officer while in the execution of his duty and all three respondents were charged under s. 5 of the Public Order Act 1936 with using threatening words and behaviour whereby a breach of the peace was likely to be occasioned.

The justices, whose attention was drawn to the decision in *Marsh v. Arscott* 75 Cr. App. R. 211, convicted Jones of assaulting a police officer but dismissed the other charges against the respondents being of opinion that the behaviour of the three youths was not likely to cause a breach of the peace and that Coleman was entitled to use reasonable force to resist his unlawful arrest. On appeal by way of case stated in relation to the charges which were dismissed:

Held: On the facts found, the justices were entitled to reach the decision they did and the appeal would be dismissed. For general guidance, however, the court would draw attention to the limits of the decision in *Marsh v. Arscott* where the incident took place on the defendant's own property where only he and the police were present. Where, as in the present case, there was a number of youths involved, the possibility of one or other of them by their behaviour bringing about by encouragement or incitement a breach of the peace by others in their group had to be considered, and such behaviour might well justify the police reasonably believing that a breach of the peace within that group was imminent. The fact that there were no other additional members of the public present who could become involved subsequently in a breach of the peace was not decisive.

Read v. Jones, Coleman and Smith Q.B.D. 477

Burden of proof under the Prevention of Corruption Acts – meaning of "consideration"

Two appeals against separate convictions at Lincoln Crown Court concerning offences under the Prevention of Corruption Act 1916, were considered together. The appellants had both been employed by the British Steel Corporation. Braithwaite was convicted of four counts of having received from contractors who dealt with his employer a gift or consideration, of car tyres, as an inducement or reward, and Girdham on four similar counts involving work done on his wife's car.

The defence in both cases was that payment had been, or was intended to be, made. The respective Judges directed that the burden of proof, under s. 2 of the 1916 Act moved to the defendant.

Held: Where an offence under the Prevention of Corruption Act 1906 is alleged, s. 2 of the 1916 Act provides that once "it is proved that any . . . consideration has been . . . given or received by" a person employed by a public body, by or from a contractor who either has or is seeking a contract with that public body, that consideration will be deemed to be given or received corruptly as an inducement or reward unless the contrary is proved. Therefore the jury must be directed: whether the defendant received consideration, and if so, the defendant must prove it was not corrupt. Since both defendants admitted receiving the consideration the burden of proof automatically shifted.

On the interpretation of "consideration" it must take the legal definition which connotes a type of contract or bargain between the parties and on proof of receipt of any consideration the defendant is called upon for an explanation. There is no ambiguity in the use of words "gift or consideration" in the Acts since "gift" covers the situation where there is no bargain. The appeals are accordingly dismissed.

R. v. Braithwaite; R. v. Girdham C.A. **301**

Compensation in criminal cases – requirement of proof – insufficient means – apportionment – selection of claims.

Two appeals concerning compensation awarded in offences of dishonesty tried at Crown Court were considered together.

In the case of *Amey*, compensation was claimed on behalf of eight individuals and the National Westminster Bank. The appellant disputed the sum claimed by one individual, of £3,000, and evidence was adduced that the true value of the claim should have been between £600 and £900. The Recorder ordered £1,000 to be paid to that claimant and the other claims to be met in full by the appellant by means of enforcing a debt owed to him, and by paying the residue by two monthly instalments over a period which would extend for more than three years.

In the case of *James* and *Meah*, Meah was convicted of receiving, and James of assisting in handling, stolen goods. Compensation was ordered to be paid in the proportion of two to one against Meah and James respectively, Meah being responsible to a greater extent.

Held: Compensation claims should be agreed or proved. Orders for payment by instalments should not extend over too long a period, nor can an order be made that an existing debt be enforced.

In *Amey's* case, on the facts, this would be a suitable case for selecting claims to be met, rather than apportioning the means available between claimants, where one claimant was in a stronger position to pursue an action in the civil courts. The appeal would be allowed.

In the case of *James* and *Meah* the claim was properly investigated and proved and on the facts was an appropriate apportionment. Appeal dismissed.

R. v. Amey; R. v. Jones and Meah C.A. **124**

Compensation order for distress caused by attack on property – whether fright and distress suffered by occupier of premises which had been damaged can be fairly covered by the words "personal injury" or "damage" within s. 35 of the Powers of Criminal Courts Act 1973 and whether they can fairly be said to have resulted from the offence of criminal damage.

In the early hours of the morning the occupiers of a house were aroused by noises coming from their front garden and became aware of the presence of a man behaving strangely and stumbling about. They telephoned the police but before the police arrived a stone was thrown through the window of the house. The occupier of the house was terrified, fearing that there would be a sustained attack and felt compelled to gather his wife and children into one room for safety. The police, on arrival, arrested the appellant, Kenneth John Bond, in a drunken state and he subsequently pleaded guilty to criminal damage. On the application of the prosecutor, the magistrates awarded £25 compensation for the damaged window and additionally, of their own motion, ordered the appellant to pay £25 as compensation to the occupier for the distress and anxiety suffered by him.

On the appeal by way of case stated against the compensation order for the distress and anxiety suffered by the occupier:

Held: that the magistrates rightly considered that there was a sufficient nexus between the behaviour of the appellant and the terror caused to the occupier and that the fright and distress suffered by the occupier could be fairly covered by either the words "personal injury" or "damage" in s. 35 of the Powers of Criminal Courts Act 1973. Accordingly the magistrates were fully entitled to award the modest sum of £25 as compensation to the occupier for the distress and anxiety suffered.

Note: Section 67 of the Criminal Justice Act 1982 which came into force on January 31, 1983, has the effect of reversing the decision in *R. v. Vivian* (1979) 143 J.P. 102 (referred to in the judgment of Griffiths, L.J.) by providing that the amount of compensation ordered "shall be of such amount as the court considers appropriate, having regard to any evidence and to any representations that are made by or on behalf of the accused or the prosecutor". That statutory provision, however, is not relevant to the decision in the present case.

Bond v. Chief Constable of Kent Q.B.D. 107

Compensation – restitution orders for the sale of goods representing the proceeds of stolen goods obtained by deception – forfeiture of property used in the commission of an offence – order for the sale of such property.

On May 20, 1982 at Leeds Crown Court, the appellant pleaded guilty to five offences under the Theft Act 1968 of theft, obtaining property by deception and handling stolen goods, and asked for 253 further offences to be taken into consideration. The offences all resulted from thefts of cheque books and Barclaycards. The appellant was sentenced to two years' imprisonment on each charge, to run concurrently, and an order was made under s. 43 of the Powers of Criminal Courts Act 1973 confiscating the appellant's car, which had been used in the commission of these offences. It was further ordered under s. 28(1) of the Theft Act 1968 (as amended by s. 6 of the Criminal Justice Act 1972) that the car and certain property found in the appellant's possession should be sold and the proceeds, together with cash found in his possession, should be distributed to the

victims, who had made no application to the court for recovery.

Held: 1. The power to confiscate goods under s. 43 of the Powers of Criminal Courts Act 1973, was intended as an additional penalty and not a compensation provision, and there is no power for the court to order the sale of such property. Accordingly in respect of the appellant's car, an order is substituted providing that it be taken into the possession of the police.
2. The order for restitution in relation to cash found in the appellant's possession falls within s. 28(1)(c) of the Theft Act 1968 (as amended) and is therefore valid.
3. The direction that certain property found in the appellant's possession should be sold and the proceeds be distributed to the victims, made under s. 28(1)(b) of the Theft Act 1968 (as amended) is limited by the proviso that such a direction can only be made on the application of a person entitled to recover from the convicted person. Further, this power is only exercisable in respect of goods which are the proceeds of the original goods. There is no power to order the sale of any goods. Accordingly this order is deleted.

R. v. Thibeault C.A. 173

Convicting of a lesser offence - s. 6(3) Criminal Law Act 1967 - whether inflicting grievous bodily harm necessarily includes "assault"

The appellant was charged at Kingston Crown Court with "maliciously inflicting grievous bodily harm on Maxim James Latham". At the start of the hearing the Judge refused a prosecution application to amend the indictment to cover an alternative charge of assault occasioning actual bodily harm and ruled that the jury could convict of the lesser offence on the count as it stood, and directed the jury accordingly. On November 4, 1981 the appellant was acquitted on the offence charged but convicted in the alternative of assault occasioning actual bodily harm.

Held: Section 6(3) of the Criminal Law Act 1967 provides that where the allegations in an indictment amount to or include another offence the jury may, if it acquits on the specific charge, find the defendant guilty of the other offence. In *R. v. Springfield* (1969) 53 Cr. App. R. 608 Sachs, L.J., applied the test "is the lesser offence an essential ingredient of the major one?" It is clear from case law on s. 20 of the Offences Against the Person Act 1861 that grievous bodily harm may be either directly inflicted by assaulting the victim, or by intentionally doing something which directly results in force being applied to the victim. The word "inflicted" is not the same thing as "assault" and it does not imply violence, therefore assault occasioning actual bodily harm is not an essential ingredient in establishing an offence of "inflicting grievous bodily harm" and cannot be an alternative verdict.

R. v. Wilson C.A. 244

Costs awarded on appeal – recovery of costs in previous courts – relevant taxing authority.

The appellants were convicted on January 23, 1981 at Exeter Crown Court of two offences under the Medicines Act 1968, fined £250 on each, and ordered to pay £1,250 towards prosecution costs. They subsequently successfully appealed against conviction and costs were ordered in their favour "out of central funds here and below".

The appellants' solicitors prepared three bills which were sent, in respect of the appeal, to the registrar of the Court of Appeal, in respect of the trial and committal to the Crown Court and magistrates' court respectively. The latter two bills were paid before the registrar considered the bill for the costs of the appeal, and then he notified the appellant's solicitors that all bills should have been submitted to him, as, following the appeal he was the taxing authority, and sums already paid had not been authorized by him. Further, the magistrates' court was not included in the phrase "the court below". On application for review:

Held: 1. It is clear from s. 7 of the Costs in Criminal Cases Act 1973 that the registrar of criminal appeals is the taxing authority where costs are allowed in an appeal before the Court of Appeal, and consequently in this case all bills should have been sent to him.

2. The Court of Appeal has discretion, under s. 7(1) of the Act to award costs in favour of a successful appellant in respect of any court which has dealt with the case, having regard to the relevant and differing circumstances involved in each hearing. Once such an order is made, it is mandatory, under s. 7(3), that costs shall compensate the appellant for any expenses properly incurred in proceedings before the courts referred to in the order.

3. "The Court below" related to the court referred to in his application before the court, which was the Crown Court, and the order was granted on that basis. *R. v. Michael* (1976) 140 J.P. 265 is authority for the view than an order for costs will only include the magistrates' court if specifically stated. A note to the Supreme Court Practice O. 62, r. 4, p. 1014, para. 62/4/6 states that on appeal from the Divisional Court to the Court of Appeal an order for costs "here and below" will be restricted to costs in the Divisional Court.

4. Accordingly, the order related to costs incurred in the court from which the appeal emanated; the Crown Court, and did not include the magistrates' court.

R. v. Agritraders Limited C.A. 233

Criminal bankruptcy order validity whether loss arises "as a result of" conspiracy power to vary sentences and orders in Crown Court.

The appellant managed a number of companies, as director and otherwise, operating as labour-only subcontractors to the construction industry, between May 1975 and April 1980. On March 25, 1981, he pleaded guilty at Willesden Crown Court to a number of offences, in respect of these companies, of conspiracy to defraud the Inland Revenue and of making false statements on tax returns. He was sentenced to three years' imprisonment on each offence, concurrent, disqualified from participating in managing a company for five years, and ordered to contribute £250 towards his legal aid costs. Subsequent to pronouncing sentence, the Judge later on the same day made a criminal bankruptcy order in respect of the offences of conspiracy to defraud, in the sum of £178,000.

Held: 1. Section 11(2) of the Courts Act 1971 provides that a sentence or order of the Crown Court may be varied or rescinded within 28 days of the day on which it was made. *R. v. Sodhi* (1978) 66 Cr. App. R. 260 is authority that "varied" in this section carries its ordinary meaning and there is no limit upon the variation exerciseable under this section. Therefore the Judge had jurisdiction to make the order.

2. Section 39 of the Powers of Criminal Courts Act 1973 states that a criminal bankruptcy order may be made in respect of loss or damage resulting from the offence. Conspiracy, that is a mere agreement to do something, is complete once the agreement is made, but does not terminate there, if the planned acts are carried out. Any loss or damage resulting from the planned acts will be sustained "as a

result of" the conspiracy: *D.P.P. v. Doot* (1973) 137 J.P. 375; [1973] 2 W.L.R. 532 is authority for this. Accordingly the order is valid and s. 40(1) of the Powers of Criminal Courts Act 1973 will apply, so that no appeal will lie.

R. v. Reilly C.A. 407

Criminal Damage Act 1971 – destruction by fire of a shed and contents – defendant a juvenile – test of "recklessness" considered – objective or subjective test determined.

Appeal by way of case-stated from a decision of the justices who found the respondent not guilty of recklessly destroying by fire a shed and its contents. The justices found that because of her age and understanding, her lack of experience of dealing with inflammable spirit and her state of exhaustion at the time she caused the fire, she would not have appreciated the risk and therefore should not be found guilty.

The appellant contended that the proper test of recklessness was that the risk was one which must have been obvious to a reasonably prudent man, not necessarily to the particular defendant.

Held: The proper test of recklessness for the purposes of the Criminal Damage Act 1971 is that which was formulated by Lord Diplock in the case of *Commissioner of Police of the Metropolis v. Caldwell* [1982] A.C. 341. The meaning of the phrase "creates an obvious risk" in that test means "creates a risk obvious to the reasonably prudent person".

Elliott v. C.A.C. (A Minor) Q.B.D. 425

Criminal Damage Act 1971, s. 22, subss. (1), (2) and (7) – two offences of minor criminal damage forming part of a series of similar offences – whether right of trial by jury dependent upon value of property damaged.

The applicant, Malcolm McClorie, was charged with two offences of criminal damage which involved damage amounting to £5 and £15 respectively. In considering jurisdiction the justices were of opinion that although the two offences were part of a series of offences within s. 22(7)(a) of the Magistrates' Courts Act 1980 and were of a similar character in fact, the offences remained triable summarily only as neither charge involved damage in excess of £200. Accordingly they refused to put to the applicant his right to elect trial by jury. On application for judicial review:

Held: Under s. 17 of and sch. 1 to the Magistrates' Courts Act 1980 such offences of criminal damage were triable either way unless s. 22(1) of that Act applied. Section 22(1) was subject to the provisions of s. 22(7) and consequently did not apply in circumstances where as in the present case the two offences were of similar character and formed part of a series. The value of the damage caused in the offences had no relevance to the question of whether a defendant had the right to elect trial by jury. Accordingly the decision of the justices would be quashed and an order of mandamus would be granted directing them to provide the applicant with the right of electing trial by jury on the two charges.

Application: for judicial review of a finding by St. Helens justices that the

applicant, Malcolm McClorie, did not have a right of trial by jury on two charges of criminal damage which formed part of a series and were in fact of a similar character, on the ground that the damage caused in each offence did not exceed £200.

R. v. St. Helens Justices. Ex parte McClorie Q.B.D. 456

Deferred sentence - mistakenly relisted seven months after date of deferment - s. 1 of the P.C.C.A. 1973, jurisdiction will not be lost for delay - court cannot be deprived of jurisdiction by reason of a mistake.

The applicant appeared at the Inner London Crown Court on April 7, 1982, on committal for sentence in respect of a burglary of a doctor's surgery, involving theft of a typewriter, prescription forms and tablets, and a later offence of attempting dishonestly to obtain drugs. The applicant appeared before Judge Cooke who deferred sentence until September 8. Since Judge Cooke was not at court on September 8, the court staff, mistakenly believing that the Judge had reserved the case to be dealt with by himself, relisted the case for November 2. On that date the applicant failed to appear as his advisers had been unable to notify him of the hearing. The issue of the jurisdiction of the court was raised and the Judge, relying on *R. v. Ingle* (1974) Cr. App. R. 306, ruled that he had jurisdiction, despite the lapse of time. The question of jurisdiction was again raised when the applicant subsequently came to court, and it was again ruled that the court had jurisdiction and the applicant was accordingly sentenced.

Application was made to the Court of Appeal (Criminal Division), if it had jurisdiction to hear the matter, to appeal against the sentences imposed on the grounds that the sentencing court had lost its jurisdiction. Alternatively if the Court of Appeal had no jurisdiction, an application was made to the court as a Divisional Court, for judicial review.

Held: On the central issue of whether the sentencing court had jurisdiction to pass sentence, the court's jurisdiction usually lasts until it has finally adjudicated on the matter, unless there is a statutory provision to the contrary, or (per Lord MacDermott in *S. v. Recorder of Manchester* [1971] A.C. 481) the court may become functus eventually.

Section 1 of the Powers of Criminal Courts Act 1973 provides that a Crown Court can defer passing sentence for not more than six months. In *R. v. Ingle* it was held that the Act did not require that the defendant must be sentenced on the date specified for the deferment, and on no other. Consequently if the mistaken belief of the court staff had been correct there would have been no objection to Judge Cooke passing sentence on November 10. The mistake cannot, therefore, deprive the court of jurisdiction which it otherwise had, and the effect of the mistake and consequent delay is an element for consideration in the sort of sentence it would be proper to pass and is not material to the jurisdiction of the court.

Since the court had the required jurisdiction the Court of Appeal (Criminal Division) has no power to review the sentences by way of appeal, nor to grant relief by way of judicial review when sitting as a Divisional Court, and the application was refused.

R. v. Anderson C.A. 499

Disorderly house – open to public – plurality of participants or spectators – status of man after "sex change" operation.

The appellants were convicted at Inner London Crown Court on September 28, 1982 in respect of two counts of keeping a disorderly house, at two addresses, and three counts of living on the earnings of prostitution, and all appellants received custodial sentences.

The offences concerned the provision of sexual services for reward at two addresses, and it was contended that since these acts took place in private between individual clients and either Gloria Greaves or Moira Tan, the requirement of plurality of participants or spectators was not present. Moreover the premises were not open to the public since the services were advertised in "contact magazines", and the acts were not in themselves criminal.

Held: *R. v. Berg and Others* (1927 20 Cr. App. R. 38 is authority that there must be an element of keeping open house, the house must not be regulated by the restraints of morality, and it must be so conducted as to violate law and good order. The premises may be open to the public, if there is an element of public invitation, such as the use of advertisements. An action need not be criminal in itself, but become unlawful by going beyond what is "acceptable" and it is for the jury to set this standard. Public nuisance is not a necessary ingredient of the offence.

In respect of the offences on the earnings of prostitution: the contention by the appellant, Gloria Greaves, that although born a man he had undergone "sex change" operations and therefore an essential ingredient of the offences was missing, is rejected. In law he remains a man. See *Corbett v. Corbett* [1970] 2 All E.R. 33.

R. v. Tan and Others C.A. 257

Enforcement of fines – imprisonment in default – single warrant of commitment in respect of several fines outstanding – whether aggregate of consecutive terms of imprisonment imposed in default of payment can exceed the maximum period of imprisonment specified for the total amount outstanding – need to issue separate committal warrants if appropriate to exceed statutory maximum imprisonment applicable to total amount outstanding.

The applicant appeared before the Midhurst justices under a transfer of fine order for a means inquiry in respect of the non-payment of fines and costs totalling £785 and the justices ordered that he be committed to prison for an aggregate of 164 days, calculated as follows:

1.	in respect of three convictions at Horseferry Road magistrates' court, London, on which he was fined a total of £250 (imprisonment for 30, 30 and 60 days consecutively)	120 days
2.	in respect of costs ordered to be paid on appeal to the Crown Court	30 days
3.	in respect of a fine and costs totalling £35 on conviction by Highbury Corner magistrates' court, London	14 days
	Total	164 days

The issue of the warrant of committal was postponed on condition that the applicant paid £20 fortnightly. On the applicant's failure to comply with the

condition a single warrant of commitment to prison for an aggregate of 164 days was issued on the basis that the single document could be construed as a series of five warrants of commitment and that no one of the five terms of imprisonment imposed exceeded the maximum permitted. On application for judicial review of the decision:

Held: Following the decision of the Divisional Court in *R. v. Southampton Justices, ex parte Davies* (1981) 145 J.P. 247, [1981] 1 W.L.R. 374 (and notwithstanding the reservations on that case expressed in the House of Lords in *Forrest v. Brighton Justices* (1981) 145 J.P. 356, [1981] 2 All E.R. 711) where a single warrant of commitment was issued for an outstanding sum, the period of imprisonment must not exceed the maximum period for the aggregate sum on the warrant. If separate periods for non-payment of separate fines were fixed to run consecutively so that the aggregate period of imprisonment exceeded the maximum period for the total sum outstanding, then separate warrants of commitment would have to be issued. Accordingly the application would be granted and the court would quash that part of the order which fixed 164 days' imprisonment and substitute for that a period of 90 days.

Per curiam: The proper course of justices when dealing with the enforcement of multiple fines and costs was to look at the whole of the circumstances, including the circumstances of the offences and the amounts of the fines or costs sought to be enforced. If they were satisfied that the justice of the case could be met by imposing a term of imprisonment which, in the aggregate, did not exceed the statutory maximum then it would be appropriate for that to be done on a single warrant. If, after full consideration they thought it right that the aggregate of the terms of imprisonment imposed consecutively should exceed the statutory maximum for the total sum outstanding, it was inevitable that separate warrants in respect of each committal would have to be issued.

R. v. Midhurst Justices. Ex parte Seymour Q.B.D. 266

Evidence – conspiracy to defraud creditors – legal professional privilege in document referred by solicitors to handwriting expert – accomplice warning.

The appellant and another, Bush, were charged with conspiracy to defraud creditors of Bush's insolvent company. Prior to the trial the appellant's solicitors had sent certain documents to a handwriting expert for his opinion. The Crown sought to call the handwriting expert as witness to produce the documents in his possession. The appellant's solicitors objected to the production of documents which had emanated from them, contending that these were transferred in the course of preparing a defence and were therefore protected by professional legal privilege. The Judge ruled that the documents were not privileged. The Judge further found that an employee of Bush, called as a witness by the Crown, was not an accomplice. The appellant's solicitors maintain that whilst not a party to the offence, the employee had assisted in defrauding creditors and therefore an accomplice warning was appropriate in respect of his evidence.

Held: The evidence of a handwriting expert is not privileged and was properly admitted. There were, further, no grounds to justify an accomplice warning.

R. v. King (D.A.) C.A. 65

Evidence - criminal trial - Judge's summing up - omission of direction on standard of proof required - application of proviso to s. 2(1) Criminal Appeal Act 1968.

The appellant was indicted at Reading Crown Court for rape. The prosecution evidence included the complainant, an independent witness who described the complainant as crying badly and distressed, and two voluntary statements by the appellant, the contents of which in each case amounted to an admission of rape. At the trial the appellant contended that the complainant had been cooperative and that the statement had contained things that had been foisted on him by the police or that he admitted the offence to get some peace. In the course of his summing up the Judge explained to the jury the burden of proof, but omitted any direction as to the standard of proof. The appellant was convicted and sentenced to two and a half years' imprisonment. He appealed against conviction.

Held: The failure of the Judge to direct the jury on the standard of proof was a serious defect in the summing-up. It was clearly the duty of the Judge to direct the jury on the standard of proof so as to ensure that that direction was heard by the jury in each criminal trial with the authority which only the Judge could give to such a direction. In this case, however, the evidence against the defendant was overwhelming. Despite the serious omission of the Judge, this was a case where beyond all doubt a reasonable jury, if properly directed, would have convicted the appellant. The proviso would be applied and the appeal dismissed.

Per Robert Goff, L.J.: We consider it to be inconceivable that counsel for the defence, acting in the best interests of their client, could have failed to draw this serious omission in the summing up to the Judge, thereby depriving their client of the benefit of the jury hearing the direction on the standard of proof from the lips of the Judge himself, if they had not shared our view of the overwhelming nature of the evidence.

R. v. Edwards C.A. **316**

Evidence – refreshing memory – whether witness who has not referred to his notes in giving evidence but has refreshed his memory from them outside the court may be required to produce the notes and whether he may be cross-examined upon them.

The appellant was charged before Leeds justices with an offence under s. 5 of the Public Order Act 1936. In giving evidence for the prosecution, the respondent, who was a police officer, did not refresh his memory from his notebook, but in answer to questions said that he had made notes therein and that before he came into court he had looked at that part of his notes which related to the appellant's replies at interview, to refresh his memory. Counsel for the appellant asked to see the notebook to see if there were any discrepances between the notes and the oral evidence and submitted she had a right to cross-examine the respondent upon all entries relating to the case. The respondent did not formally object to the proposed inspection. The justices ruled that the defence could inspect the notebook but was not entitled to cross-examine the witness on matters contained therein to which the witness had not referred in his evidence and upon which he had not refreshed his memory, whereupon counsel for the defence closed her cross-examination without inspecting the book. There being no application for an adjournment pending determination of the point of law involved, the justices proceeded to hear the whole of the evidence and convicted the appellant. On appeal by way of case stated:

Held: 1. The defence was entitled to see documents such as notebooks from which memory has been refreshed subject only to the well established rules that a witness can be cross-examined upon the material from which he refreshed his memory without the notebook being made evidence in the case, whereas if he were cross-examined beyond those limits the defence took the risk of the document becoming evidence and available for use by the court.

2. That principle applied equally to cases where memory was refreshed outside the door of the court as it did to cases where memory was refreshed in the witness box. (The decision to the contrary in the Scottish case of *Hinshelwood v. Auld* (1926) S.C. (J.) not being followed). It would be a question of fact as to where the line was to be drawn in relation to the length of time between the refreshing of memory and the giving of evidence.

3. Accordingly the justices were wrong in law in ruling that the appellant could inspect but was not entitled to cross-examine the prosecution witness upon relevant matters contained in his notebook, but as no application had been made to the justices to adjourn the case for the determination of that point, no order on the case stated would be made.

Owen v. Edwards Q.B.D. 250

Legal aid - financial considerations - whether an applicant for legal aid in criminal proceedings whose resources immediately available at the date of the application do not exceed £75 may be ordered to make a down payment as part of a contribution towards the legal aid costs and given time to save up the necessary sum of money.

An application for a legal aid order was submitted on September 15, 1982 in the prescribed form by the applicant, Mark Lee Woodcock, who was charged with assaulting police officers in the execution of their duty, and the statement of means disclosed that he had no capital or savings of any description. The application was refused and when the case came before the justices on September 21, the solicitor for the applicant made a further application. On being told that the reason for the earlier refusal was not on the merits of the application but on financial grounds, the solicitor pointed out that his client's resources at the date of application did not exceed £75, relying on reg. 6(4) of the Legal Aid in Criminal Proceedings (Assessment of Resources) Regulations 1978 which provides as follows:

> "Where it appears desirable in the interests of justice to make a legal aid order, such an order shall not be refused if . . . (b) the applicant's resources at the date of the application which are immediately available do not exceed £75 . . .".

After retiring, the justices indicated that they were willing to grant a legal aid order subject to a down payment of £50 and their attention was then drawn specifically to reg. 6(4) above. After a further retirement the justices announced that they proposed to adjourn the case for three weeks to enable the applicant to save up the necessary sum of money.

On an application for an order of mandamus directing the justices to grant a legal aid order without a down payment or contribution:

Held: that in assessing the applicant's resources for the purpose of reg. 6(4) of the Legal Aid in Criminal Proceedings (Assessment of Resources) Regulations 1978 the magistrates were only entitled to consider his resources at the date of the application which were immediately available and as at that time he did not have resources which exceeded £75 it was irrelevant that over a period of two or

three weeks he could have saved the £50 down payment ordered. In the circumstances of this case the Regulations impose an obligation upon the magistrates to grant a legal aid order where it is desirable in the interests of justice to do so without any down payment and accordingly the order of mandamus would be granted.

R. v. Selby Justices. Ex parte Woodcock Q.B.D. 72

Obtaining by deception – dishonoured cheques nature of "representation" implied in drawing post-dated cheques.

The appellant was convicted at St. Albans Crown Court on February 18, 1982 under ss. 15 and 16 of the Theft Act 1968, on three counts of obtaining property by deception and one count of obtaining a pecuniary advantage by deception. The offences concerned events in 1978 when the appellant ran a stationery business in Luton. From July 1978 the company bank account ran into a substantial unauthorized overdraft and the first three counts relate to cheques made out to a supplier for goods, and the fourth count related to a cheque to a supplier with whom the appellant had a running account. All four cheques were in effect post-dated and all were subsequently dishonoured. The point of law raised by counsel for the appellant at first instance and as the subject matter of the appeal, was that the representation implied by a post-dated cheque amounted to "no more than the drawer was a customer of the bank on which the cheque was drawn". (cit. *Archbold*, p. 1090).

Held: *Commissioner of Police for the Metropolis v. Charles* (1976) 140 J.P. 531; [1977] A.C. 177 is authority for the principle that the "deception" element in offences under ss. 15 and 16 of the Theft Act 1968 which involve dishonoured cheques, consists of a false representation that the cheque in question is a valid order for the payment of that amount. However, that case concerned representations as to existing facts. In the case of a post-dated cheque the drawer impliedly represents that the existing facts at the date when he gives the cheque are such that in the ordinary course the cheque will be met when presented on or after the date specified thereon.

Accordingly the appellant, by giving cheques which were dishonoured, made a false representation amounting to "deception" within the provisions of ss. 15 and 16 of the Theft Act 1968.

R. v. Gilmartin C.A. 183

Offensive weapon – whether a flick-knife is an offensive weapon per se i.e. an article made for causing injury to the person.

The respondent, in a public place, was seen by two police officers to take a flick-knife (within the meaning of the Restriction of Offensive Weapons Act 1959) from his trouser pocket, to operate it, showing it to two youths and then put it back in his pocket. He was arrested and charged that he had with him in a public place an offensive weapon without lawful authority or reasonable excuse, contrary to s. 1 of the Prevention of Crime Act 1953. At the hearing of the case the magistrates came to the conclusion that the flick-knife was not an offensive weapon per se, that is to say an article made or adapted for use for causing injury to the person, and accordingly they then went on to consider whether the prosecution had satisfied them that the respondent intended to use the knife for causing injury. They concluded that the prosecution had not discharged that burden of proof and accordingly acquitted the respondent.

On appeal by the prosecutor by way of case stated:

Held: allowing the appeal, that a flick-knife as defined by s. 1 of the Restriction of Offensive Weapons Act 1959 was an offensive weapon per se being made for the purpose of causing injury to the person within the provisions of s. 1 of the Prevention of Crime Act 1953 and that the justices fell into error in deciding otherwise.

Gibson v. Wales Q.B.D. 143

Possession of offensive weapon in public place – whether the landing of a block of flats on housing estate is a "public place" under s. 1 of the Prevention of Crime Act 1953.

The appellant, when standing on an upper landing of a block of flats on a housing estate, had a claw hammer in his hand and was charged with having, without lawful authority or reasonable excuse, with him in a public place an offensive weapon, namely a claw hammer, contrary to s. 1 of the Prevention of Crime Act 1953. It was not disputed that the claw hammer was an offensive weapon and the only issue before the justices was whether the upper landing was a public place within the meaning of that section. The appellant pleaded not guilty but when the justices rejected the submission made on his behalf that it was not a public place, he changed his plea to guilty.

The housing estate comprised 420 flats of a uniform construction divided into blocks, each having four floors with numerous stairways giving access to each level. At each floor level there was a walkway or pavement serving all the flats on that level and there was a balustrade on each of the floors above ground level to prevent people from falling over the edge. There was nothing to prevent members of the public entering the estate or the stairways or landings and there were no notices, barriers or doors to restrict their access to these areas.

On appeal by way of case stated against the finding of the justices that the landing was a public place it was submitted: (1) that the justices had misdirected themselves; and (2) that their decision was perverse.

Held: 1. That the justices had not misdirected themselves in expressing the opinion "that the estate had to be considered as a whole with the exception of the actual dwellings" or that they were entitled to have regard to the mischief at which s. 1 of the Prevention of Crime Act 1953 was directed.

2. The concept of "public place" had two distinct alternative elements, namely a place to which at the material time "the public have access" or "the public are permitted to have access". It was clear that the justices decided that the landing was a public place for the first of these two reasons. On the facts found there was no inevitable inference that the estate ceased to be a public place before the landings were reached in the absence of any restrictions being imposed on members of the public entering.

Accordingly the justices did not make any error of law in finding that the landings were a public place.

Knox v. Anderton Q.B.D. 340

Publishing advertisement offering reward for return of stolen goods and implying that no questions would be asked – whether offence under s. 23 of Theft Act 1968 is one of strict liability – and whether an employee of a limited company which publishes such an advertisement

can himself be guilty of that offence.

The appellant was the advertising manager of a weekly newspaper and had overall responsibility for checking advertisements and deciding which would be published. An advertisement was published in terms offering £5 reward for the return of stolen property with no questions asked. The advertisement was published without the appellant's knowledge. He was convicted of an offence under s. 23 of the Theft Act 1968, the justices overruling defence submissions that he could not be found guilty: (1) unless he had actual knowledge of the publication of the advertisement; and (2) because as a servant of the company he had not published the advertisement. On appeal by way of case stated on these two points:

Held: 1. An offence under s. 23 of the Theft Act 1968 was one of strict liability being one of a quasi-criminal nature governed by a regulatory provision.

2. On the facts, it was plain that the appellant was the only person who could be said to be the controlling mind of the company for the purpose of publication of the advertisement, and in his position in the company he did publish the advertisement and was the only person who could do so.

Accordingly the justices were right and the appeal would be dismissed.

Denham v. Scott Q.B.D. 521

Sentencing - Misuse of Drugs Act - large-scale importation, relevant principles.

On June 28, 1982 the appellant was convicted of importing cannabis worth over £100,000, and sentenced to six years' imprisonment. He is British, aged 50, with a wife and three children, and has two previous convictions for similar offences, the last in 1972 when he was sentenced to three years' imprisonment.

Held: The Court reviewed sentencing policy in respect of drugs offences.

1. Class A drugs, the most addictive drugs such as heroin and morphine, have the greatest incentive to suppliers because of the ease with which they can be handled and the huge profits to be made, and the court having regard to the serious effect on the user, and the consequential evils of the trade, will regard deterrent sentences as appropriate. Where there is large-scale importation, such as over £100,000 worth, a prison sentence of over seven years would be proper, and correspondingly higher where the value is substantially more. A sentence of less than four years' imprisonment would be rare. Supplying Class A drugs would rarely justify a sentence of less than three years' imprisonment unless the level of involvement is remote from the source of supply. It is only in cases of simple possession that it would be proper to take account of the personal circumstances of the offender to any major extent.
2. Where Class B drugs, such as cannabis, are concerned, importation of amounts equivalent to 20 kilogrammes of herbal cannabis or more will normally attract a sentence of between three and six years' imprisonment, and for lesser quantities between 18 months and three years, dependent on all the circumstances. Large scale importation or supply of cannabis would justify a sentence of about 10 years' imprisonment, and supply on a lesser scale would warrant a sentence of one to four years' imprisonment. Generally good character is of little importance in this type of offence. In cases involving possession of small amounts it might be appropriate to impose a fine, unless the defendent is a persistent offender.

Accordingly, in the present case, where a very large quantity was involved, there are no mitigating features, and the defendant contested the case, the sentence of six years' imprisonment is appropriate. The appeal is therefore dismissed.

R. v. Aramah C.A. 217

Theft – dishonest appropriation – it can take place after sale of goods, passing of property.

The appellant was convicted at Chelmsford Crown Court on January 29, 1982 of stealing a cooker from his employers. He contended that he had ordered the cooker for his own use, as he was entitled to do, and had always intended to pay for it, although in the event he had forgotten to do so, and therefore there had been no dishonesty when he acquired the cooker. The Crown submitted that the "dishonest appropriation" took place either at the time of the original transaction or at some subsequent time. The Judge had directed the jury solely on the requirement of dishonesty and had not dealt with the relevance of when the "property" in the goods had passed.

Held: The relevant provisions of the Theft Act require proof of dishonesty at the time of the appropriation, and that the appropriation relates to property belonging to another. It was found that there had been no dishonesty in the original transaction, and a sale had taken place, whereby property had passed to the appellant, under the Sale of Goods Act provisions. Therefore there could have been no subsequent dishonest appropriation by the appellant within the terms of the Theft Act.

The summing-up had, in so far as it omitted any mention of the relevance of property in the goods, been inadequate, and in all the circumstances it would not be appropriate to apply the proviso to s. 2(1) of the Criminal Appeal Act 1968, and accordingly the appeal is allowed.

R. v. Stuart C.A. **221**

Trial – evidence of child of tender years – procedure to ascertain child's appreciation of the duty to tell the truth – corroboration – misdirection by Judge – proviso to s. 2(1) Criminal Appeal Act 1968 not applied.

The appellant, Colin Frederick Campbell, was convicted before the Crown Court of an offence of indecent assault on a girl aged nine and three-quarter years. The Judge, having questioned the girl, allowed her to give her evidence on oath. It was thus not *essential* that her evidence be corroborated. The appellant now complained that the evidence should not have been received on oath and that therefore corroboration *was* needed. In the course of his direction to the jury, the learned Judge correctly discussed the need as a matter of safety to look for corroboration and then gave guidance as to which particular parts of the evidence could amount to such corroboration. The appellant complained that the Judge misdirected the jury. Counsel on behalf of the Crown argued that even if there had been some material irregularity, the proviso to s. 2(1) of the Criminal Appeal Act 1968 should be applied on the basis that no miscarriage of justice had actually occurred.

Held: 1. The Judge had clearly followed the procedure laid down by the Court in *Hayes* (1977) 141 J.P. 349; (1977) 64 Cr. App. R. 194 concerning the questioning of children before allowing evidence to be given, and so was entitled to exercise his discretion to allow the evidence to be given on oath.

2. Having directed the jury to the need to look for corroboration, the Judge misdirected them in a material particular which in this case would make the conviction unsafe.

3. This was not a case for the application of the proviso and the conviction was quashed.

R. v. Campbell C.A. **392**

What constitutes a brothel?

The respondent was charged with assisting in the management of a brothel contrary to s. 33 of the Sexual Offences Act 1956. The prosecution evidence established prima facie that she was assisting in the management of a massage parlour licensed by the appropriate local authority, and that on payment of the appropriate fee on entry, massage or sauna and massage were provided. During the massage extra services were offered by the masseuse concerned for additional fees usually paid direct to the masseuse, such services involving the masturbation of the client by the masseuse. There was no evidence that the additional fees were treated as part of the takings of the establishment. The respondent was fully aware of the sexual services provided by the masseuses and she herself also acted as a masseuse and performed masturbation. There was no evidence, however, that full sexual intercourse was offered at the premises.

The metropolitan stipendiary magistrate dealing with the case was satisfied that the women concerned were common prostitutes but he was not satisfied that a prima facie case had been made out that the premises were a brothel because there was no evidence that sexual intercourse was provided. He therefore dismissed the information without calling upon the respondent to answer it. The prosecutor appealed by way of case stated.

Held: On a charge of assisting in the management of a brothel in contravention of s. 33 of the Sexual Offences Act 1956 it was not essential that there be evidence that normal sexual intercourse is provided in the premises. It is sufficient to prove that more than one woman offers herself as a participant in physical acts of indecency for the sexual gratification of men. The view thus expressed gave content to s. 6 of the Sexual Offences Act 1956 which provided that premises shall be treated for the purposes of ss. 33 to 35 of the Act of 1956 as a brothel if people resort to it for the purpose of lewd homosexual practices in circumstances in which resort thereto for lewd heterosexual practices would have led to it being treated as a brothel for the purposes of those sections.

Accordingly the appeal would be allowed and the case remitted to the magistrate to hear and determine.

Kelly v. Purvis Q.B.D. 135

DANGEROUS DRUGS

Possession of controlled drug – whether a person who smokes cannabis resin necessarily has the controlled drug in his possession within the meaning of s. 5(2) of the Misuse of Drugs Act 1971.

The police found the four respondents and a man called Davies squatting in a house, in which they also found two pipes and a quantity of cannabis resin which belonged to Davies. All four respondents admitted they had been smoking cannabis resin owned by Davies while on those premises and were charged with having in their possession a controlled drug namely a quantity of cannabis resin contrary to s. 5(2) of the Misuse of Drugs Act 1971. The justices accepted a defence submission that merely by smoking an unspecified amount of cannabis resin the respondents could not, in law, be said to be in possession of it, and dismissed the charge. On appeal by way of case stated:

Held: If a person smokes cannabis resin he must have cannabis resin in his

possession at the time of smoking, otherwise he would not be able to smoke it. Accordingly the justices had erred and the case would be remitted to them with a direction to convict the four respondents.

Chief Constable of Cheshire Constabulary v. Hunt and Others Q.B.D. 567

FOOD AND DRUGS

Food and Drugs — importance of establishing context when classifying food as "unwholesome" — jurisdiction to make destruction order — s. 9 of the Food and Drugs Act 1955, regs. 6 and 7 of the Imported Food Regulations 1968.

The appellants were the owners of a quantity of dates which were heavily infested with insects. The dates were intended to be treated and used in the manufacture of brown sauce. It was common ground that the dates were not unfit for human consumption. However, the public analyst had certified them as being unwholesome for human consumption, but there was no mention of whether this conclusion depended on whether or not the dates were to be treated. The respondent, a justice of the peace, ordered their destruction on the ground of unwholesomeness, in reliance on s. 9 of the Food and Drugs Act 1955 and regs. 6 and 7 of the Imported Food Regulations 1968. Neither the Act nor the Regulations defined "unwholesomeness". The Divisional Court upheld the destruction order. On appeal to the Court of Appeal:

Held: (a) The combined effect of s. 9 and regs. 6 and 7 was to give the respondent jurisdiction to make a destruction order in respect of unwholesome imported food; but (b) The real issue was that food which was wholesome in the context of an untreated use may be wholesome in the context of a use involving treatment. Alternatively, it may be wholesome or unwholesome in all normal contexts. In view of the fact that the respondent's consideration was never clearly directed to this issue, his order must be quashed and the appeal must be allowed.

R. v. Archer. Ex parte Barrow, Lane & Ballard Ltd. C.A. 503

Food and Drugs - straw in bottle of milk — whether this affects quality of food demanded by the purchaser — s. 2(1) of the Food and Drugs Act 1955.

The respondents were charged under s. 2(1) of the Food and Drugs Act 1955 in that they sold a bottle of milk to the prejudice of the purchaser which was not of the quality demanded by the purchaser, namely the unopened bottle of milk contained a green plastic straw. There was no evidence as to whether the straw was sterile or not. The magistrates dismissed the information on the basis that the unexplained presence of a plastic straw in a bottle of milk did not make the milk not of the quality demanded by the purchaser. On appeal:

Held: allowing the appeal, that where a case is concerned with the presence of extraneous matter in food, it is not necessary for the prosecution to prove that the

extraneous matter is deleterious. It is sufficient for the prosecution to prove that the presence of the extraneous matter will give rise to the consequence that a

Barber v. The Co-operative Wholesale Society Limited Q.B.D. 296

HEALTH, WELFARE AND SOCIAL SECURITY

Health and Safety at Work etc. Act 1974, s. 33(1) – failure to comply with requirements of improvement notice – whether it is a defence to prove that it was not practicable or reasonably practicable to do more than was in fact done to satisfy the requirements, or whether failure to comply is an offence per se.

The respondent company was the occupier of a factory concerned with the manufacture of furniture employing about 25 or 30 people. The Factories Inspector went to the premises and found that the manner in which plastic foam was being stored was a potential fire risk and he therefore served on the respondent an improvement notice dated February 8, 1982, under s. 21 of the Health and Safety at Work etc. Act 1974 requiring specified work to be done by May 1, 1982. The respondent failed to comply with that notice and was charged with an offence under s. 33(1)(g) of the Act in respect of that contravention. The justices found that the respondent had expected to vacate part of the premises by May 1 and that although the work on the other part of the building was put in hand in good time, the respondent had been let down by the contractor and other efforts to have the work done had proved unsuccessful. The justices were satisfied that the respondent had not fully complied with the requirements of the improvement notice, but accepting a submission under s. 40 of the Act that all that was reasonably practicable had been done to comply with the notice, they dismissed the information.

On appeal by way of case stated:

Held: An offence under s. 33(1)(g) of the Act was committed by the contravention of any requirement imposed by an improvement notice and the provisions of s. 40 of the Act were irrelevant. Under the latter section the question as to whether it was practicable or reasonably practicable to do more than was in fact done, applied only to proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something so far as was practicable or reasonably practicable. Proceedings for an offence under s. 33(1)(g) in failing to comply with the requirements of an improvement notice, did not fall within that category. Accordingly the justices were in error in accepting the submission and the appeal would be allowed.

Deary v. Mansion Hide Upholstery Limited Q.B.D. 311

Social Security Act 1975 – conviction of offence of failing to pay contribution under s. 146 – evidence adduced of previous failure to pay contributions – duty of court to order payment of outstanding contributions.

The defendant company was convicted of an offence under s. 146 of the Social Security Act 1975 of failing to pay a Class I contribution under that Act in respect

of an employed earner and was granted an absolute discharge. Having obtained that conviction, the prosecutor, on behalf of the Department of Health and Social Security, adduced evidence to prove previous failures by the defendant to pay contributions totalling £4,938.08 having given proper notice of his intention to do so under s. 151 of the Act. That evidence was not contested and the justices were invited to make orders for the payment by the company to the Secretary of State for Social Services of £42.32 being the unpaid contribution in respect of the offence charged (under s. 150 of the Act) and of £4,938.08 in respect of which evidence had been given (under s. 151(5) of the Act). The justices were informed that although the orders were required, it was not intended to enforce them against the company which was in liquidation. (Section 152(4) of the Social Security Act 1975 provides that where a company fails to pay such contributions which it is liable to pay, the amount outstanding may be recovered jointly and severally from any directors of the company who knew or could reasonably be expected to have known of the failure to pay).

The justices refused to make any order in respect of the unpaid contributions and on application for judicial review:

Held: On conviction of an offence of failing to pay contributions under s. 146 of the Social Security Act 1975 a defendant was "liable to pay" to the Secretary of State under s. 150 any unpaid contribution in respect of which he has been convicted and, under s. 151, any previous unpaid contribution which has been proved by evidence following the conviction, provided that due notice has been served on the defendant. Under that legislation the phrase "liable to pay" meant that the justices were obliged to make an order to pay once the non-payment was proved. Accordingly the justices were wrong to decline to make an order in respect of the unpaid contributions and their decision would be quashed and a mandamus order would be made.

Per curiam: Section 152(4) of the Social Security Act 1975 created a special remedy against directors of a company exercisable after the procedure laid down by the Act had been followed, which involved a conviction under s. 146, then consequent upon liability under s. 150, the power to go back two years to prove additional failures to pay. All that presupposed orders of the court reflecting the liability established by the evidence which were the purpose and machinery of the scheme.

R. v. Melksham Justices. Ex parte Williams Q.B.D. 283

HUSBAND AND WIFE

Exclusion from matrimonial home – application for injunction against husband requiring him to leave matrimonial home – wife unable to find other suitable accommodation for herself and children but having no reasonable ground for refusing to live in matrimonial home with husband – whether the needs of the children are paramount – whether relevant to consider the reasonableness of the applicant's conduct.

Application to be by originating summons referring to s. 1 of the Matrimonial Homes Act 1967.

The wife petitioned for divorce and later made an application in the divorce proceedings for an injunction that her husband, among other things, should leave the matrimonial home. She was strong-willed and was determined not to return to the matrimonial home so long as the husband was living there. It appeared that she had no reasonable ground for that refusal and the allegations in her petition did not appear to be serious, amounting to nothing more than that she was

disenchanted with her husband. Having considered the interests of the children, the Judge granted the wife's application and the husband appealed. The Court of Appeal dismissed his appeal, and with the leave of the Appeal Committee he appealed to the House of Lords.

Held: 1. (Lord Scarman dissenting) An application under the Matrimonial Homes Act 1967 is to be decided by reference to the provisions of the statutes. The court is required to have regard to the four matters set out in s. 1(3), which include the conduct of the spouses to each other and otherwise and the needs of the respective spouses, and none of those matters is made to have any more weight than the others and none is paramount. The reasonableness of the wife's conduct should have been considered.

Elsworth v. Elsworth (1979) 9 Fam. L. 21; (1980) 1 F.L.R. 245, C.A.
Myers v. Myers [1982] 1 All E.R. 776; 12 Fam. L. 117, C.A., approved.
Bassett v. Bassett [1975] 1 All E.R. 513; Fam. 65, C.A.
Walker v. Walker [1978] 3 All E.R. 141; 8 Fam. L. 143, C.A.
Samson v. Samson [1982] 1 All E.R. 780; 12 Fam. L. 118, C.A. disapproved.

2. (Lord Scarman dissenting) The custody and upbringing of a child is not directly in question in ouster proceedings, and the paramount status of the child's interests now contained in s. 1 of the Guardianship of Minors Act 1971 does not apply.

3. (Per Lord Scarman) The discretionary decision of the Judge was wrong because the wife had not established a prima facie case for excluding the husband from the matrimonial home.

4. The practice of making an application for an ouster order by issuing a summons in the divorce suit is in conflict with the rules of court. An application under s. 1 of the Matrimonial Homes Act 1967 should be by originating summons in Form 23 in the Matrimonial Causes Rules 1967.

Per Curiam: (Per Lord Hailsham of St. Marylebone, Lord Chancellor): It is not necessarily for the interests of children that either parent should be allowed to get away with capricious, arbitrary, autocratic, or merely eccentric behaviour. It may well be difficult for a court to exercise control, but the difficulty is not rendered less if the court is prepared to throw its hand in so readily.

Appeal allowed.

Richards v. Richards H.L. **481**

Maintenance order – amount of periodical payments – ex-husband's second family entitled to supplementary benefits on account of second wife's illness – calculation of ex-husband's ability to maintain children of his first marriage.

The ex-husband's second wife suffered from multiple sclerosis, was immobile and required constant help. Their income consisted in part of supplementary benefit including attendance allowance and mobility allowance.

Held: Those allowances should not be taken into account as part of the ex-husband's income when considering his ability to contribute to the maintenance of the three children of his first marriage.

Appeal: from the decision of Norwich Magistrates' Court on May 7, 1981

reducing the husband's periodical payments in respect of the three children of his first marriage from £5 to £3 per week.

Claxton v. Claxton Fam. Div. 94

Reciprocal enforcement of maintenance orders – affiliation order made in Hague Convention country – appeal against registration in England – public policy as a ground for refusal of registration – Maintenance Orders (Reciprocal Enforcement) Act 1972 as adapted by Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1979, para. 6(6).

The Cantonal Court of Justice for the Canton of Valais in the Swiss Federal Republic adjudged A to be the father of a child born to N and ordered the payment of money for the benefit of the child. That order was sent to a magistrates' court in England and was registered. A appealed to the court of registration to have the order set aside, and that appeal was dismissed.

A appealed to the High Court by case stated, submitting that registration would be manifestly contrary to public policy because of the circumstances in which the order had been obtained. The circumstances cited were: (1) the court of judgment could not observe the demeanour of the witnesses whose evidence was heard on a different occasion by the Judge who prepared the dossier; (2) the percentage of probability that A was the child's father, deducted from serological material, was mis-typed in the court's judgment and it was inferred that the court had taken account of the wrong (higher) figure; (3) at the probable time of conception A was suffering from a complaint which might have reduced his sexual drive but would not have impaired his sexual ability, but only the latter point was referred to in the judgment; (4) the judgment imposed an obligation on A to prove that he was not the father but did not refer to the propositions A had advanced.

Held: (1) The procedure of the court of judgment under the Swiss civil code was not a departure from natural justice such as to require the rejection of every order made by that court (p. 9 C-D).

(2) The serological evidence was used as corroboration of other evidence, and if the higher figure was in fact used there was nothing to suggest that the value of the evidence as corroboration would have been less if the lower figure had been used (p. 14, D-F).

(3) The failure by the court of judgment to refer to a supposition favourable to the appellant advanced in a medical report was not a breach of natural justice (p. 16, A-C).

(4) A's submission was based on a wrong statement of the facts, A having had the opportunity to nullify the prima facie case made by the complainant and having failed to do so (p. 16, D-G).

Appeal dismissed.

Per incuriam. Where a foreign decree is made in accordance with the proper procedures of the foreign law, and there is no fraud or similar delinquency involved in the case, the court will only reject the decree if the foreign law concerned is so

offensive to the English conception that it would constitute an infraction of the rules of natural justice in the eye of the English court for the decree to be the subject of recognition here (p. 9 A-B).

Armitage v. Nanchen Fam. Div. 53

LICENSING

Licensing – application for grant of provisional justices' on-licence in respect of community block forming part of school premises and managed by separate community association – applicants were headmaster and deputy headmaster of school – whether regarded as persons "interested" in the premises – s. 6(1) of the Licensing Act 1964.

The two applicants were, respectively, headmaster and deputy headmaster of Moreten School, Wolverhampton. In 1981 a community block was built as part of the school. It included a sports hall, a theatre and music rooms, also recreational and meeting spaces. It was designed at the request of the education sub committee to meet stringent health and safety requirements. The local education authority intended that those facilities should be used not only by the school, but also by local community organizations and by persons attending adult classes during out of school hours. A local community association authorized by the local education authority was founded in order to co-ordinate the facilities. The deputy headmaster, Mr. Moore, was personally responsible both to the headmaster, and as secretary to the Community Association for the running of the community block. An application was made in April, 1982, for a justices' licence. This was refused. There was an appeal to the Crown Court against that decision and the appeal was to be heard by an assistant recorder and four justices. A preliminary point was taken by counsel on behalf of the respondents that the two applicants had no locus standi because they were not "persons interested" in the premises within the meaning of s. 6(1) of the Licensing Act 1964. The court acceded to that submission, and the applicants applied to the Divisional Court for judicial review.

Held: The proper construction of the phrase in s. 6(1) was broader than argued on behalf of the respondents. There was no reason why one should import automatically any requirement of an interest in property, legal or equitable, nor any requirement of any actual contractual right to operate on the premises. Certiorari would issue to quash the decision of the Crown Court and mandamus would issue to require the court to continue the hearing of the appeal and to decide whether in the circumstances of the case the headmaster and deputy headmaster could properly be described as persons interested in the premises.

R. v. Dudley Crown Court. Ex parte Pask and Moore Q.B.D. 147

Licensing – application for off-licence – decision of committee to grant subject to undertaking – whether legally enforceable – Licensing Act 1964, s.4.

On June 16, 1982 the applicants made application to the Edmonton Licensing Committee for an Off-Licence under s. 4 of the Licensing Act, 1964. They already held a wholesaler dealers' licence issued under the Alcoholic Liquor Duties Act 1979 and their purpose in making the application was to enable them to sell liquor

in smaller quantities than those permitted under a wholesale licence to small retailers who would then sell them to the public. The justices were concerned that the small quantities would in fact be bought for personal consumption, and considered that it was an appropriate case for them to ask the applicants for an undertaking that they would not sell intoxicating liquor except to holders of a justices' licence. The applicants gave that undertaking reluctantly and then the licence was granted. The applicants subsequently found the restriction impracticable and applied for judicial review on the basis that the justices had exceeded their power by asking for the undertaking as a condition of the licence.

Held: it was not possible on the grant of an off-licence to impose a legally enforceable undertaking as a condition for the grant of that licence. Since the licence had been granted on the basis of the undertakings it would be wrong to quash the undertakings and leave the licence standing. Accordingly the whole licence would be quashed and the matter would be remitted to the justices for reconsideration.

Per Curiam: Justices were not prevented from asking applicants for licences to give an assurance as to how they proposed to run their business and bearing that in mind when considering whether to grant the licence. Such an assurance, once given, was not enforceable and nothing would prevent the licence-holder from departing from it, although it was something which might be borne in mind when he applied for renewal.

R. v. Edmonton Licensing Justices. Ex parte Lawrence Baker and Amir Tayebali Kapadia Q.B.D. 26

Licensing – application for provisional grant of on-licence for a barge to be moored on the banks of a river – whether able to constitute "premises" within s. 1(2) of the Licensing Act 1964.

The appellant submitted an application to the licensing justices of Bath for a provisional grant of a justices' licence authorizing him to sell by retail intoxicating liquor for consumption either on or off the premises, the premises being a barge named "The Pride of Bath" which was to be moored on the east bank of the River Avon between North Parade Bridge and Pulteney Bridge in Bath. The barge was, when moored, intended to be used as a house for the sale of intoxicating liquor to the public. At other times it was intended to be used for cruising on the River Avon, carrying passengers for hire or reward. The justices refused the application because they believed (inter alia) that a vessel which could at any moment leave its moorings and travel along the river and was intended to do so on a regular basis lacked the permanency necessary to constitute "premises" within s. 1(2) of the Licensing Act 1964. The applicant appealed.

Held: There had to be an underlying idea of fixity to a permanent site — something in the nature of a structure which is permanently fixed at a particular point to constitute "premises" within the Act. The justices were correct in holding that this barge could not properly be regarded as premises within that meaning. Appeal dismissed.

Gate v. Justices for the County of Avon Q.B.D. 289

Licensing application for renewal of justices' off-licence – policy adopted by licensing committee after original grant of the off-licence, that all

such premises should be run as a "shop within a shop" – objection to renewal made by justices' clerk – failure by applicant to make structural alterations to premises necessary to comply with policy – whether policy valid.

Gerald Hodes was manager of Marks and Spencers Stores at Peascod Street, Windsor. There was in respect of those premises a justices' off-licence which had been first granted by the Windsor Licensing Committee in 1975. The application was made and the licence was granted on the basis that the display and sale of intoxicating liquor was to be by self-service methods together with and in the same way as other goods in the food hall of the store. The licence had been renewed each year without objection, was transferred to Mr. Hodes in 1979 and renewed in 1980 and 1981. In 1979 the licensing committee adopted a policy whereby all off-licences would be required either to be specifically designed as off-licences or to have a separate controlled area for the sale of intoxicating liquor i.e. "a shop within a shop". The clerk to the committee wrote to Marks and Spencers giving particulars and requesting compliance with the policy by February, 1981.

There was a further letter to all holders of off-licences on September 7, 1981. Marks and Spencers wrote back saying that after serious consideration they felt unable to change to a "shop within a shop" operation. At the hearing of the application for renewal on March 8, 1982, the clerk to the justices gave evidence on oath that he made formal objection on behalf of the licensing justices to renewal of the off-licence. No reasons were given, and he was not cross-examined. Eventually the applicant and his witnesses gave evidence, generally about the operation of similar licensed premises by Marks and Spencers, and specifically about the store in question. The justices refused to renew the licence. The applicant appealed by way of judicial review to the Divisional Court seeking an order of certiorari to quash the decision and an order of mandamus directed to the justices to hear and properly determine the application for renewal. On November 19, 1982 the Divisional Court (Webster, J.) dismissed the application. The applicant appealed against that decision.

Held: 1. It was clear that the Licensing Committee, having published a policy, did not consider the application on its individual merits as they were bound to do;

2. The justices were not entitled to refuse to renew the licence on an objection raised by themselves when no evidence had been given on oath in support of the objection . . . no attempt had been made either in the correspondence or at the hearing to explain the policy — still less to justify its application to the particular premises. The appeal would be allowed, orders would be made for certiorari to quash the justices' decision, for mandamus directing them to hear and properly determine and for a declaration that the justices were wrong to refuse to renew the justices' off-licence in respect of the premises.

R. v. Windsor Licensing Justices C.A. **353**

Licensing – application for special order of exemption – closed circuit television coverage of championship boxing match in America – meaning of "special occasion" in s. 74(4) of the Licensing Act 1964.

On September 1, 1981, the applicant, John Maynard, who was licensing manager of Rank Leisure and joint licensee of the Odeon Theatre, Edgware Road, London W.2., applied to the Commissioner of Police for the Metropolis for the grant of a special order of exemption to add to the permitted hours at the cinema to allow intoxicating liquor to be sold between midnight, September 16 and 5.00 a.m., September 17, 1981. The occasion was a contemporaneous closed circuit television

presentation of the welter-weight championship of the world boxing match taking place in the United States of America. The Commissioner refused the application on the basis that the event could not be classed as a special occasion to benefit people watching television. The applicant sought a declaration that the decision was wrong in law and on the facts.

Held: Although as an event the world welter-weight championship was "special" in the ordinary sense of the word, the showing of it in the applicant's cinema was not an occasion which was related to any national or local event, nor was there any participation in the event by those who were to benefit from the extension of hours. The application lacked the essential ingredients of a "special occasion" and the commissioner had been correct to refuse it. The application was accordingly dismissed.

R. v. Commissioner of Police for the Metropolis. Ex parte Maynard Q.B.D. 250

Licensing – application for special orders of exemption in respect of 12 occasions held in 13 weeks for lunches held during pheasant shoots – objection on grounds of frequency – whether events were capable of being "special" – s. 74(4) of the Licensing Act 1964.

A licensee made application to a magistrates' court for 12 orders of exemption from permitted licensing hours on the occasions of lunches to be held during pheasant shoots in a 13 week period during October, November and December, 1982 and January, 1983. At the hearing the police objected to the applications, contending they were not "special" owing to their frequency. The justices granted the applications on the basis that the functions were not to be held at uniform intervals, and were not so frequent as to be incapable of being special occasions and that they were properly characterized as "local occasions". The Chief Constable appealed by way of case stated.

Held: the justices had not applied the three tests laid down in *R. v. Berwyn Justices, ex parte Edwards* [1980] 1 W.L.R. 1045 and thus did not ask themselves whether this series of occasions was capable in law of being a special occasion. The 12 shoots spread over 13 weeks could not at law be said to be special occasions in the locality; there was nothing special about them either nationally or locally. The appeal was allowed, but no order was made as the events in question had taken place.

Chief Constable of Kent v. Denyer Q.B.D. 403

Licensing – expiry of justices' on licence – failure to renew – application for occasional licences to cover period until application for renewal could be made – meaning of "occasion" – s. 180 Licensing Act, 1964.

The joint licensee of premises known as "Tokyo Joes" in Piccadilly, London W1 for which a justices' on-licence had been in force, omitted to apply for renewal of the licence and it therefore expired on April 4, 1982. It was not until police officers visited the premises on May 19, 1982 that he realized his oversight. He immediately instructed solicitors to apply for renewal of the licence and it was renewed,

unopposed, on July 20. His solicitors also applied on his behalf for two occasional licences under s. 180 of the Licensing Act 1964, each of the three weeks duration, to cover the period until the renewal application could be heard. In their letter of application for the occasional licences the solicitors gave all relevant details including the reason for the application. A copy was sent to the police. The metropolitan magistrate granted the occasional licences although the commissioner opposed the grant on the basis that the application did not relate to "occasions", in the sense of meaning "events" or "functions". The commissioner applied for judicial review by way of a declaration that the grant of the two occasional licences was wrong in law and on the facts.

Held: Upon a true construction of s. 180 of the Licensing Act 1964 there was nothing in the wording of the section to prohibit an application of the kind with which the court was concerned. Nor was there anything in the section to limit the discretion that the magistrate might exercise. The words "occasion" and "occasionally" had reference to the circumstances which gave rise to the need or the alleged need for the sale at premises other than those for which the applicant held an on-licence rather than meaning an event or function. The application for a declaration was accordingly dismissed.

R. v. Bow Street Justices. Ex parte The Commissioner of Police of the Metropolis Q.B.D. 147

LOCAL GOVERNMENT

Local Government Law – obstruction of a local government elector who wishes to inspect documents – criminal liability of an officer – ss. 225 and 228 of the Local Government Act 1972, and regs. 4 and 5 of the Local Government (Allowances) Regulations 1974.

The respondent, a local government elector, wished to inspect claim forms submitted by members of Wakefield metropolitan district council. The appellant, the council's chief financial officer, refused to allow such inspection. The justices convicted the appellant of obstructing the respondent on two occasions and made an order of absolute discharge in respect of each offence but ordered the appellant to pay the respondent's costs of £200.

At the time of the alleged offences, the council's practice was to record, in the form of a computer printout, payments in respect of allowances and it was agreed that this record was available for inspection. However, it was only the claim forms themselves which contained details of how the claims were constituted.

Held: the joint effect of ss. 225(1) and 228(5) of the Local Government Act 1972, and the Local Government (Allowances) Regulations 1974, was that the claim forms would not be within the right of inspection unless it was shown that they were deposited pursuant to the standing orders of either House of Parliament or to any enactment or instrument and that they were to be received and retained in the manner and for the purpose directed by the standing order, or enactment, or instrument as the case may be. There was nothing in the Act or the Regulations to indicate that claim forms came within the scope of that form of words and accordingly no offences of obstruction had been committed. Appeal allowed.

Brookman v. Green Q.B.D. 555

MAGISTRATES

Appeal – order of magistrates' court in respect of children of the family – appeal to Divisional Court – nature of Divisional Court review of magistrates' decision – discretion to admit new evidence – comparison with appeal from a Judge to Court of Appeal.

A magistrates' court made an order giving the wife custody of three children of the family and made provision for access by the husband and for supervision by the local authority. The husband appealed. He submitted:

1. That the Divisional Court hearing the appeal should hear all the evidence again; and
2. That the Divisional Court hearing an appeal from magistrates has a wider discretion under O. 55, r. 7(2), to admit new evidence than has the Court of Appeal under O. 59, r. 10(2).

Held: (1) The trial of an appeal by the Divisional Court from a magistrates' court is indistinguishable from the trial of an appeal by the Court of Appeal from a Judge, and it is not necessary for the Divisional Court to conduct a rehearing by hearing all the evidence again. It is a review conducted upon the basis of the evidence received by the magistrates, and findings of primary fact by the magistrates, and such further evidence as may be properly admitted.

(2) Order 59, r. 10(2), limits the admission of further evidence by the Court of Appeal to the case where special grounds can be shown. The Divisional Court is not subject to an identical limitation because there are no similar words in O. 55, r. 7(2), but the Divisional Court must have some ground for the exercise of its discretion and should not normally depart from what is appropriate for the Court of Appeal. There is no obligation in a children case to be specially indulgent in the exercise of that discretion. The Divisional Court was prepared to admit evidence of new matters which had not been available in the magistrates' court, but did not admit evidence which, though available for the magistrates' court hearing, had been omitted because it had seemed that the case would be strong enough without it.

Appeal allowed in part on the facts of the case.

P. v. P. Fam. Div. 548

Bail – application for bail following previous refusal – whether court restricted to considering fresh grounds which have arisen since the refusal or whether it should consider the whole of the circumstances including those which existed when the previous application was made.

The applicant, Daniel William Shankshaft, who was legally represented, was remanded in custody on a charge of going equipped for burglary, bail being refused after full argument for bail submitted by his solicitor. At the adjourned hearing on an application for a further remand in custody, the defence solicitor submitted that there were fresh grounds entitling him to apply for bail, namely the alleged availability of proper sureties and the illness of the applicant's mother. The justices came to the conclusion that they could not look at anything but the fresh grounds and that they should not look back to grounds which had been put before them by the solicitor at the previous hearing. Although the justices had before them the notes of evidence taken at the earlier hearing the defence solicitor was not

allowed to address the court at length on the matters previously argued. On application for judicial review:

Held: Although the justices purported to follow the principles laid down by Donaldson, L.J., as he then was in *R. v. Nottingham Justices, ex parte Davies* (1980) 144 J.P. 233 in relation to succesive applications for bail, they did not pay sufficient regard to the statement in the judgment which read: "Accordingly on a second application it is almost always possible for an applicant for bail or his advocate to submit correctly that there are matters to be considered by the court which were not considered on the first occasion". That was the heart of the judgment and meant that a second application for bail could only be of any value or use if the whole of the circumstances were taken into account, the old as well as the new. In these matters it was necessary to look at the accumulation of facts, bearing in mind the facts of previous applications, how they were put and what the objections were at that particular time. Accordingly the justices were wrong to proceed on the basis of half an application for bail and the orders of certiorari and mandamus would be made.

R. v. Barking Justices. Ex parte Shankshaft Q.B.D. 399

Bias – justices having knowledge of other charges against defendant – correct test to apply – whether practice of producing computerized court sheets for justices showing outstanding charges and convictions awaiting sentence is wrong in law.

When the applicant appeared before the justices to stand trial on a charge of criminal damage, the court sheets produced by a computer disclosed the fact that he was charged with seven other offences. His solicitor submitted that the bench should not continue to hear the allegation as they would, or might be, prejudiced by the knowledge from the court sheets of those outstanding charges to which he had not yet pleaded. In similar circumstances the clerk to the justices had previously instructed the court clerks that they should advise magistrates that there is no good reason in law why they should not proceed to deal with cases where they know that there are a number of charges against a single defendant if they are so minded. The justices directed the trial to continue and convicted the applicant.

On an application for judicial review seeking an order of certiorari and a declaration that the practice of producing such computerized court sheets was wrong in law:

Held: 1. That the court was satisfied that the magistrates never exercised their discretion as to whether to continue with the hearing and accordingly an order of certiorari would be granted quashing the conviction.

2. That the application raised the following two questions of fundamental importance:

(a) ***What should be the proper approach of the magistrates, having learned of previous convictions and/or outstanding charges, to an application made to them not to try the case?***

The correct test to apply was whether there was the appearance of bias, rather than whether there was actual bias. The test to be applied can conveniently be expressed by slightly adapting the words of Lord Widgery, C.J., in *R. v. Uxbridge JJ, ex parte Burbridge* (1972) *The Times*, June 20, (referred to in *R. v. McLean ex parte Aitkens* (1975) 139 J.P. 266): Would a reasonable and fair minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant

was not possible?

(b) *The computer system*

The question was whether the practice of producing for a bench of magistrates computerized court sheets showing all outstanding convictions awaiting sentence and all outstanding charges including the charge which the Bench was about to try, was wrong in law. Such a practice was most undesirable and there was a real danger that administrative convenience was being given greater priority than the requirements of justice. Neither r. 66 of the Magistrates' Courts Rules 1981 nor the form prescribed in it contained provision for the entry in the court register (of which the court sheets were a part) of any offence other than that in respect of which the court was to adjudicate. Accordingly the court would grant the declaration sought that the practice complained of by the applicant was wrong in law.

R. v. Liverpool Justices. Ex parte Topping Q.B.D. 154

Bail whether on committal for trial justices entitled to refuse bail without hearing application in circumstances where no new material to consider other than the fact of the committal for trial itself.

The applicants, Kenneth Martin Duncan and Nigel William Embling, were jointly charged with three offences of burglary. Having previously been remanded in custody when an application for bail was refused on the ground that there was a likelihood of their committing further offences if granted bail, they appeared on committal proceedings on February 26, 1982.

On the completion of the committal proceedings the solicitor for the applicants sought to apply for bail but conceded that there was nothing contained in the evidence which would affect the reasons why bail had been refused on the previous occasion and that there were no material circumstances which had changed except "the committal proceedings and the changes which flow from those proceedings". The justices decided not to allow a fresh application for bail. On application for judicial review:

HELD:

1. Under sch. 1, para. 2 of the Bail Act 1976, before the discretion to refuse bail arises, the court has to be satisfied that there are substantial grounds for believing that one of the events described in sub-paras. (a) or (b) or (c) of that paragraph will happen. It is the existence of substantial grounds for the belief, not the belief itself, which is the crucial factor. Accordingly, following *R. v. Nottingham Justices, ex parte Davies* (1980) 144 J.P. 233, if one court finds as a fact that substantial grounds do exist at the time of its determination, a later court must accept this finding. Otherwise, the second court would be acting as an appellate court and reversing the decision of a court of equal status, unless, of course, there has been a material change of circumstances.
2. The mere fact that the committal for trial stage had been reached was not in itself a material change of circumstances of the kind referred to. (Passage in judgment of Donaldson, L.J., in *R. v. Reading Crown Court, ex parte Malik* (1981) 145 J.P. 132 to the contrary held to be *obiter dictum*).
3. Accordingly, in the present case, the justices were entitled to refuse bail because there was no new material before them relevant to the question of bail, and their decision should have been announced in those terms.

R. v. Slough Justices. Ex parte Duncan and Embling Q.B.D. 1

Committal proceedings – joint offenders – reporting restrictions – objection by one of the accused for reporting restrictions to be lifted – relevant considerations – Magistrates' Courts Act 1980, ss. 8(2), 8(2A).

In committal proceedings on March 23, 1982, the applicant, Harry Sykes, appeared before Leeds magistrates' court with four co-accused charged with conspiracy to rob when application was made on behalf of one of the co-accused, Ronald William Priestly, for reporting restrictions to be raised under s. 8(2) of the Magistrates' Courts Act 1980. The basis of the application was that whereas at an earlier hearing on March 2, 1982, a police officer had indicated to Priestly's solicitor that certain charges against his client would be dropped, the solicitor was now told that all the charges would proceed and he wanted to protest about it. The application for reporting restrictions to be raised was also supported by the solicitor for another co-accused called Aldridge. There was a conflict in the affidavit evidence submitted to the appeal court as to whether an additional ground for reporting restrictions to be lifted was that press publicity would bring the case to the notice of potential witnesses.

The solicitor for the appellant, Harry Sykes, opposed the application to raise the reporting provisions on the ground that the trial would be prejudiced.

After initially ordering, incorrectly, that reporting restrictions be partially raised, the justices decided they would raise the restrictions in respect of all the defendants and made an order accordingly.

On an application for judicial review to quash the order of the magistrates:

Held: 1. Section 8(2A) of the Magistrates' Courts Act 1980 provides that where in the case of two or more accused one of them objects to the making of an order under subs. (2) of that section that reporting of the committal proceedings be permitted, the court shall make the order if, and only if, it is satisfied, after hearing the representations of the accused, that it is in the interests of justice to do so.

2. Without attempting any comprehensive definition, "the interests of justice" incorporate as a paramount consideration that the accused should have a fair trial. When the justices have to balance the request for the committal proceedings to be reported, they must bear in mind that the prima facie rule is that committal proceedings should not be reported, and only if a powerful case is made out for their reporting, should they be prepared to make an order when one of the accused objects.

3. Approaching the present case on the basis that the only substantial ground put forward for raising the reporting restrictions was that Priestly's solicitor had at one stage been told by the police that his client would not have to face all the charges and that at a later stage the police told him that they were going on with all those charges, the court was quite unable to see how giving publicity to that state of affairs was likely to have any effect whatever on the ultimate fairness of the trial of the accused Priestly. Accordingly, the justices did not weigh the balance fairly between all the accused and an order for certiorari would go.

R. v. Leeds Justices. Ex parte Sykes Q.B.D. **129**

Committal proceedings – whether justices entitled to give prosecution opportunity to call witness to clarify his written statement admitted as evidence under s. 102 of the Magistrates' Courts Act 1980 following defence submission that the prosecution evidence is insufficient to warrant defendant's committal for trial.

In committal proceedings against Richard Kaminski on a charge of burglary, the prosecution evidence consisted of written statements under s. 102 of the Magistrates' Courts Act 1980 which were read out. At the conclusion of the reading of those statements counsel for the applicant submitted that the evidence deposed by them was not sufficiently strong to warrant his committal for trial. The examining magistrate being anxious to have the evidence of one of the witnesses clarified, adjourned the hearing to give the prosecution the opportunity of calling that witness.

On an application for judicial review:

Held: that the court will only be prepared to interfere if it can be shown that the committing justices have acted without jurisdiction or in excess of jurisdiction or have refused to exercise the jurisdiction that they undoubtedly have. In the present case, the submission of the applicant that the examining magistrate had no jurisdiction to allow the prosecution a short adjournment to call clarifying evidence was rejected and the application refused.

Per curiam: If, as established by authority (see *Royal v. Prescott-Clarke* (1966) 130 J.P. 274), magistrates in summary proceedings following a defence submission of no case to answer have a discretion when actually trying a case to allow the prosecution an adjournment to make good a technical lacuna in their case by calling further evidence, they must equally have jurisdiction to allow the prosecution a short adjournment to call a witness in order to clarify his written deposition.

R. v. West London Justices. Ex parte Kaminski Q.B.D. 190

Magistrates – appeal against compensation order to Crown Court withdrawn – alternative application for judicial review of compensation order – whether discretion to entertain application should be exercised when statutory appeal procedure not invoked.

The applicants pleaded guilty to a number of burglaries of dwellinghouses involving the theft of £4,282 and following a deferment of sentence the justices imposed two years' probation and 60 hours' community service on each applicant and ordered each of them to pay £214.10p. compensation at the rate of £1 weekly. They appealed to the Crown Court against the compensation orders but on being informed by the Judge that he had power to review the whole sentence, they withdrew their appeals and applied to the Divisional Court for judicial review of the compensation orders.

Held: There was a statutory framework under s. 108 of the Magistrates' Courts Act 1980 and s. 9 of the Courts Act 1971 under which provision was made for appeals against sentence of this kind from the magistrates' court to the Crown Court. In the present case there was no question of the justices having had no jurisdiction to make the compensation orders or of there being any breaches of the rules of natural justice, and the suggestion that the compensation orders were harsh and oppressive was a matter which ought to be dealt with within the statutory framework. Accordingly the court would exercise its discretion not to entertain the application.

R. v. Battle Justices. Ex parte Shepherd and Another Q.B.D. 372

Magistrates – bail – forfeiture of surety's recognizance – whether means of surety relevant in deciding amount of recognizance to be forfeited – principles to apply in determining amount to be forfeited.

On February 1, 1982, the applicant who had stood surety in the sum of £7,000 for the appearance of the defendant before the magistrates' court, was summoned to show cause why he should not forfeit the sum of £7,000 following the defendant's failure to surrender to his bail. The justices heard evidence regarding the applicant's culpability in respect of the non-appearance of the defendant but declined to hear any evidence from the applicant or any argument from his solicitor on the question of his means, taking the view that means were irrelevant to the issue. On the basis of culpability alone the justices ordered the applicant to forfeit £5,000 of his recognizance and granted him time to pay until March 3, 1982 when a means inquiry was held in relation to the payment of that sum.

On an application for an order of certiorari to quash the order,

Held: that in considering the amount of a surety's bail recognizance which should be forfeited on the defendant's failure to surrender to his bail, the justices were obliged to hear any evidence as to his means which the surety wished to adduce as well as any evidence as to his culpability in relation to the defendant's non-appearance. It followed that the justices were wrong in law in excluding evidence as to the applicant's means before making the forfeiture order, and an order of certiorari would be issued to quash the order.

Per curiam: In considering the forfeiture of a surety's bail recognizance following the failure of the defendant to surrender to his bail, the main principles, derived from the authorities, to apply, are as follows:

1. When a defendant for whose attendance a person has stood surety fails to appear, the full recognizance should be forfeited, unless it appears fair and just that a lesser sum should be forfeited or none at all.
2. The burden of satisfying the court that the full sum should not be forfeited rests on the surety and is a heavy one. It is for him to lay before the court the evidence of want of culpability and of means on which he relies.
3. Where a surety is unrepresented the court should assist him by explaining these principles in ordinary language, and giving him the opportunity to call evidence and advance argument in relation to them.

R. v. Uxbridge Justices. Ex parte Heward-Mills Q.B.D. 255

Magistrates – committal for sentence to the Crown Court under s. 38 of the Magistrates' Courts Act 1980 – whether facts revealed to magistrates' court before decision to deal with the case summarily can be taken into consideration in deciding whether to commit for sentence – or whether decision to commit for sentence dependent upon information subsequently disclosed to court.

The applicant, Nigel Wayne Cooper, appeared before the Guildhall justices charged with theft, taking a motor vehicle without the owner's consent and using that motor vehicle without insurance. Before deciding to deal with the case summarily on November 17, 1982, the justices were informed that he had three sets of other charges outstanding against him at other magistrates' courts and that he wished to have one offence taken into consideration. On the justices accepting jurisdiction, the applicant pleaded guilty to the offences and was remanded in

custody for reports. After further remands he appeared before the same justices on January 6, 1983, by which date he had already been committed for trial to Croydon Crown Court by the South Western magistrates' court on one of the sets of outstanding charges against him. Being of the opinion that it was desirable that the Guildhall offences should also be dealt with at Croydon Crown Court, the justices committed the applicant in custody for sentence there under s. 38 of the Magistrates' Courts Act 1980 and (in respect of the insurance offence) under s. 56 of the Criminal Justice Act 1967.

On application for an order of certiorari to quash the committal for sentence:

Held: When considering whether to commit a defendant to the Crown Court for sentence under s. 38 of the Magistrates' Courts Act 1980 justices must take account only of information relative to his character and antecedents which came to their knowledge after they decided to deal with the case summarily. Information which was made available to them when deciding the mode of trial cannot be taken into consideration again when they are considering committal for sentence. Accordingly the order committing the applicant for sentence would be quashed and the justices directed to deal with the case.

R. v. Guildhall Justices. Ex parte Cooper Q.B.D. 466

Magistrates committal proceedings delay in commencing prosecution whether delay of itself can amount to an abuse of process of the court powers of court to decline jurisdiction in cases involving delay relevant considerations.

The applicant was charged before examining justices with an offence under s. 20 of the Misuse of Drugs Act 1971 in that between September 1, 1980, and October 15, 1980, in this country he assisted in the importation of heroin into Holland being an offence under a corresponding law in that country. He was first interviewed by the police about the offence on December 23, 1982, and after evidence had been adduced in the committal proceedings it was submitted by his counsel that the delay amounted to an abuse of the process of the court and that the applicant should not be committed for trial. There was evidence before the justices that on September 24, 1980, the applicant had falsely obtained a passport in the name of Tobitt (in respect of which he was subsequently convicted on December 4, 1981) and it was alleged that he was present at Schiphol Airport in Holland in circumstances which pointed to his implication in the importation of heroin. He was first interviewed about that matter in December 1982 but the detective inspector in evidence refuted the suggestion that there was some impropriety in, or lack of justification for, the failure to interview him earlier and said that the interview was delayed in the hope that it might be possible for the applicant to lead the police to "bigger fish".

The justices decided that there was no abuse of the process of the court and being satisfied that there was a case to answer committed the applicant for trial at the Crown Court.

On application for judicial review by way of an order to quash the committal for trial:

Held: that examining justices had power to control and prevent abuse of their process by declining jurisdiction in appropriate cases, and that there could be very extreme cases where delay by the prosecution in commencing proceedings could of itself constitute an abuse of the court process. In the authorities to which the court

had been referred, however, delay had been accompanied in each case where it was held to be an abuse of court process, by some deliberate exercise of bad faith, or inefficiency, or, at its lowest, by an inference drawn by the court that something had gone wrong with the prosecution process. Where the delay was accompanied by misconduct on the part of the prosecution that would lead the court to be more ready to consider the delay as constituting an abuse of the court process and, conversely, where the defendant had contributed to the delay the court might be less ready to hold that there had been an abuse of the process. Where, as in the present case, there was a positive explanation put forward by the prosecution to show why the delay, or part of it, had occurred, that was a factor to be taken into consideration. In a case involving delay it was a question of degree with which the court must be concerned.

In the present case the justices did have material on which they could arrive at the decision they did and the application must fail.

R. v. Canterbury and St. Augustine Justices.
Ex parte Turner Q.B.D. 193

Magistrates – Cost in Criminal Cases Act 1973 – s. 12(3) – award of costs against prosecutor where information not proceeded with – whether application for such costs must be made at the time of withdrawal of proceedings or whether it may be made at a subsequent hearing.

A summons against the applicant, Ian Wildish, alleging that he assaulted a child contrary to s. 42 of the Offences Against the Person Act 1861 was issued for hearing at Bolton magistrates' court on April 8, 1982. The applicant was informed, however, that if he intended to plead not guilty the case would be adjourned and he would be notified of the date of hearing later. On March 25, the applicant's solicitor wrote to the court indicating a plea of not guilty and asking for an adjournment. Not having received a reply the solicitor telephoned the court on April 5 and was advised that a new date of hearing would be notified. Shortly before April 8, the informant notified the court and the applicant that he wished to withdraw the prosecution, whereupon the court listed the case on that date and marked it "withdrawn". Neither the applicant nor his solicitor was informed that the case would be dealt with on that date. In subsequent correspondence with the clerk to the justices the applicant's solicitor indicated that he wished to make application to the court under ss. 12(3) and (4) of the Costs in Criminal Cases Act 1973 for costs against the informant but was advised by the clerk that he was not aware of any authority for an application for costs to be heard on a date subsequent to an adjudication.

The relevant sub-sections of s. 12 of the Costs in Criminal Cases Act 1973 are as follows:

"12(3) Where an information is laid before a justice of the peace for any area but the information is not proceeded with (whether by summary trial or by an inquiry by examining magistrates) a magistrates' court for that area may make such order as to costs to be paid by the prosecutor to the accused as it thinks just and reasonable.

(4) An order under subs. (3) above shall specify the amount of the costs ordered to be paid".

On application for judicial review:

Held: Where an information was withdrawn, an application for costs to be paid by the prosecutor to the accused could be made to a magistrates' court for the same

area as that in which the information was laid either on the date on which the proceedings were withdrawn or at a later date. Accordingly an order of mandamus would be issued directing the application for costs to be heard.

R. v. Bolton Justices. Ex parte Wildish Q.B.D. 309

Magistrates – dismissal of case in breach of rules of natural justice – defendant in jeopardy – application for judicial review proper mode of procedure – no power in the Divisional Court to quash an acquittal and order a new trial unless proceedings a nullity – anomalous position when compared with powers of Divisional Court on appeal against acquittal by case stated.

The defendant, Peter Arnold Roots, who was legally represented, appeared before the justices charged with assaulting a police officer in the execution of his duty and using threatening behaviour whereby a breach of the peace was likely to be occasioned. At the start of the case the prosecutor applied for an adjournment as a witness was on leave. The defence did not object but informed the court of the dates when the defendant would be on holiday. After retiring the justices decided to adjourn the case to a date within that holiday period. Counsel for the defendant objected but the justices, stating that they were in a difficult position, dismissed the case. The prosecutor invited the court to reconsider that decision pointing out that he was able to proceed with the case on the evidence available and submitting that he should have been given the option to offer no evidence or to proceed. The justices having retired and consulted their clerk decided that their decision to dismiss the case would have to stand. On application on behalf of the prosecution for a judicial review:

Held: There had plainly been a breach of the rules of natural justice by the justices in dismissing the charges without giving the prosecution an opportunity to present their case. However, the dismissal amounted to an acquittal and on an application for judicial review (which was the correct mode of proceeding in the present case) the Divisional Court had no power to re-open the matter by quashing the acquittal and remitting the matter to the justices to hear the evidence. Had the proceedings before the justices been a nullity the defendant would not have been in jeopardy of conviction and the prosecution would have been free to commence fresh proceedings for the same offences.

Per curiam. We wish to record our disquiet at the anomaly which appears to us to be revealed by the present case in the procedure for reviewing decisions of justices. Of course, the policy underlying the pleas of *autrefois acquit* and *autrefois convict* is well understood; but the procedure for appeals by way of case stated constitutes in reality, if not in form, a recognition that superior courts may review decisions of justices under which they acquit defendants, and that the procedure of review may result in conviction of the defendant, despite the earlier decision by the justices to acquit him. It must appear strange to complainants that, when the basis of their case is so serious a matter as a breach of the rules of natural justice, they are bound to adopt a procedure under which if there has been an acquittal, this court has no power to intervene; although in less serious matters an appeal may lie by way of case stated, in which event the court has power to interfere despite the decision of the justices to acquit the respondent.

R. v. Dorking Justices. Ex parte Harrington Q.B.D. 437

Magistrates - domestic proceedings - application for financial provision on the ground of failure to provide reasonable maintenance - effect of applicant's desertion - Domestic Proceedings and Magistrates' Courts Act 1978, s. 3(1)(g).

The appellant wife deserted her husband and subsequently applied for an order for financial provision for herself under Part I of the Domestic Proceedings and Magistrates' Courts Act 1978 on the ground that the husband had failed to provide reasonable maintenance for her. The magistrates found as a finding of fact that the appellant wife had deserted her husband and was wholly to blame for the separation that occurred and that her desertion was "gross and obvious misconduct". The magistrates ordered the husband to pay £15 per week maintenance (i.e. ⅓ths of their joint gross incomes) limited to five years, and in making their determination took the wife's conduct into account as conduct in relation to the marriage pursuant to s. 3(1)(g) of the Domestic Proceedings and Magistrates' Courts Act 1978. The wife appealed against the adequacy and duration of the order, claiming that the magistrates should have ordered her husband to pay £45 per week without limit. Her appeal to the Divisional Court was dismissed, she appealed with leave to the Court of Appeal (Civil Division).

Held: (1) A wife who has deserted her husband without just cause is still entitled to apply for maintenance. The Court should reduce or eliminate maintenance for her only if it would offend a reasonable person's sense of justice to disregard her past conduct, but, save in such an exceptional case, the court should not take past conduct into account.

(2) A husband who, through no fault or wish of his, is compelled to start a new life on his own should not have to pay as much maintenance to his wife as if conduct on his part had been responsible for the break up.

(3) Where the blame is wholly on the wife's side and her conduct is grave and obvious it is an exceptional case and her misconduct should not be disregarded, but it was not wrong to order that the husband pay for five years only an amount representing one eighth of the joint gross incomes.

Wachtel v. Wachtel [1973] Fam. 72, *Armstrong v. Armstrong* (unreported), *Kokosinski v. Kokosinski* [1980] F.D. 80, *West v. West* [1978] F.D. 1 considered.

Per Curiam: it was the duty of the Divisional Court to review the manner in which the magistrates exercised their discretion in the light of the facts found by them, it would not have been entitled to reverse any primary finding of fact by the magistrates unless clearly satisfied that it was wrong and would not have been entitled to interfere with the exercise of their discretion unless satisfied that they had misdirected themselves on a point of principle or that the exercise of their discretion was clearly wrong for other reasons (per Kerr, L.J.)

Robinson v. Robinson C.A. 33

Magistrates - domestic proceedings - test to be applied in determining whether a respondent "has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent" under s. 1(c) of the Domestic Proceedings and Magistrates' Court Act 1978.

The test to be applied by a magistrates' court in determining whether a respondent "has behaved in such a way that the applicant cannot reasonably be

expected to live with the respondent" under s. 1(c) of the Domestic Proceedings and Magistrates' Court Act 1978 is the same as in divorce proceedings under s. 1(2)(b) of the Matrimonial Causes Act 1973. In assessing what is reasonable the same test must apply, namely that of Dunn, J., in *Livingstone-Stallard v. Livingstone-Stallard* [1974] 2 All E.R. 766 (approved and applied in *O'Neill v. O'Neill* [1975] 3 All E.R. 289 C.A.) namely "would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties?"

Bergin v. Bergin Fam. Div. 118

Magistrates – enforcement of costs and compensation ordered on conviction of defendant who is serving term of imprisonment – likelihood that defendant has assets to meet amount outstanding – considerations in deciding whether appropriate to issue distress warrant of commitment to prison – observations on whether imprisonment should be concurrent or consecutive to existing term.

The defendant, Philip Thornhill, was convicted on 15 counts of an indictment charging offences of conspiracy to supply controlled drugs and possession of controlled drugs and was sentenced to 10 years' imprisonment and ordered to pay £500 towards the costs of the prosecution. The Judge made the order to pay costs on the basis of information that the police were in possession of £735 which had been found in the defendant's possession in circumstances which strongly suggested it was part of the proceeds of his drug dealing activities. Later the defendant wrote to the Birmingham magistrates' court from prison saying that he could not pay the £500 and asking the magistrates to give consideration to the situation. At the hearing before the magistrates the defendant's solicitor drew attention to the fact that moneys were held by the police but said they belonged to the defendant's brother and that this matter had been brought to the Judge's attention at the Crown Court. He invited the magistrates to issue a committal warrant against the defendant for 60 days' imprisonment to run concurrently with the 10 years' imprisonment he was currently serving. The magistrates made a committal order in those terms.

On application by the prosecutor for judicial review on the grounds that instead of ordering a concurrent prison term for the default in payment of the costs, the magistrates should have issued a distress warrant which would have enabled the £500 costs to be recovered from the defendant's money in the possession of the police,

Held: 1. When exercising their jurisdiction under s. 76 of the Magistrates' Courts Act 1980 to enforce an order for payment of costs or compensation magistrates had a discretion either to proceed by way of issuing a warrant of distress for the purpose of levying the sum or to issue a warrant committing the defaulter to prison. In order to exercise that discretion magistrates must inquire into the means of the defaulter, but they did not, at that stage, have to be satisfied that there was no doubt about the defaulter's ability to pay. If the evidence revealed that there was a reasonable likelihood that the defaulter had assets available to satisfy the sum he owed, the magistrates should proceed by way of a warrant of distress rather than by way of a warrant committing the defaulter to prison. A concurrent prison sentence was no penalty at all and if applied generally might result in a failure to collect very substantial sums of money from those with the ability to pay.

2. There being material available in the present case which might well lead the

magistrates on further consideration to issue a warrant of distress, the committal order would be quashed and the matter remitted to them for further consideration.

Per curiam: In all future cases in which men serving prison sentences seek to initiate enforcement procedures under s. 76 of the Magistrates' Courts Act 1980 it would be prudent of the magistrates to make inquiry of the prosecution to see whether or not the police were currently holding any property that might belong to the defaulter.

R. v. Birmingham Justices. Ex parte Bennett Q.B.D. 279

Magistrates – hearing plea of mitigation in camera – relevant considerations in deciding whether to conduct proceedings in camera – alternative procedures available in hearing pleas of mitigation to avoid disclosure of information which against interests of defendant or public to reveal in open court.

The defendant, Norman Crawford, pleaded guilty before Reigate justices on November 1, 1982 to a number of charges of burglary, theft and criminal damage. His antecedents then handed to the justices showed that on July 23, 1979 he had been sentenced to a total of five years' imprisonment for serious offences of burglary, robbery and possessing a firearm with 84 offences taken into consideration. After considering documents submitted by the defence and also a probation report, the justices acceded to a request by the defendant's solicitor that the public be excluded from the court "in the interests of justice", they having been advised by the clerk that it was a matter for their discretion and that the prosecution agreed with the application. After the court had been cleared the justices heard the defendant's solicitor's address in mitigation and following a retirement sentenced the defendant in open court to a total of six months' imprisonment, suspended for two years. They gave no reasons for their lenient sentence. There was immediate and strong criticism of the justices in the national press which revealed the defendant's true identity, and the fact that he had previously assisted the police in consequence of which his life had been seriously affected since his release from prison — information which the defence was anxious not to reveal in open court.

On application by the publishers and editor of the *Surrey Mirror* for judicial review of the decision to hear the plea of mitigation in camera:

Held: The general principle governing the administration of justice requires that it be done in open court to which the press and public are admitted and in which, in criminal cases, all evidence is communicated to the court publicly. Only where the application of this principle in its entirety would frustrate or render impracticable the administration of justice or where there was statutory authority, was departure from this principle justified in the interests of justice. It was not sufficient that the court should as a matter of discretion only, decide to hear the mitigation in camera; consideration should have been given to alternative procedures for dealing with the problem which confronted the defence. In the present case the defence could have handed in to the justices a statement agreed with the prosecution and then drawn their attention to the relevant factors, or alternatively the justices could have made an order under s. 11 of the Contempt of Court Act 1981 prohibiting the publication of the defendant's name.

R. v. Reigate Justices. Ex parte Argus Newspapers and Larcombe Q.B.D. 385

Magistrates – hospital order without convicting defendant – whether trial of defendant is necessary before magistrates' court can exercise its powers – Mental Health Act 1959, s. 60(2).

The applicant suffered from severe mental subnormality and was a voluntary patient at a hospital. He assaulted an occupational therapist employed at the hospital and was charged with assault occasioning actual bodily harm. Two medical reports produced to the court expressed the opinion that the applicant was suffering from sub-normality and mental illness which warranted his detention in hospital for medical treatment and that a hospital vacancy was available. The court decided that the offence was suitable for summary trial and asked the applicant whether he consented to summary trial. It was clear that he neither understood what was meant nor was capable of making such a decision, and he said nothing. **The applicant's solicitor asked the justices to exercise their powers under s. 60(2) of the Mental Health Act 1959 by making a hospital order without** convicting the applicant.

The justices decided that since they could not hear any evidence until the applicant had consented to summary trial (which it was not possible for him to do) they could not be satisfied that he did the act alleged, as they were required to do, before taking steps under that section. Accordingly they came to the conclusion that they had no option but to inquire into the information as examining justices under s. 20(3) of the Magistrates' Courts Act 1980 which provides as follows:

> "After explaining to the accused . . . (his right of trial at the Crown Court or summarily) . . . the court shall ask him whether he consents to be tried summarily or wishes to be tried by a jury, and –
> (a) if he consents to be tried summarily, shall proceed to the summary trial of the information;
> (b) if he does not so consent, shall proceed to inquire into the information as examining justices".

On an application for judicial review by way of mandamus:

Held: The words of s. 60(2) of the Mental Health Act 1959 were clear. The subsection gave the justices power in an appropriate case to make a hospital order without convicting the accused. No trial was therefore called for. The circumstances in which it will be appropriate to exercise this unusual power are bound to be very rare and will usually require the consent of those acting for the **accused if he is under a disability so that he cannot be tried. That was just the sort** of rare case which Parliament must have contemplated as justifying the justices having such a power. Accordingly the application succeeded but no formal order of mandamus was necessary.

R. v. Lincoln (Kesteven) Magistrates' Court.
Ex parte O'Connor Q.B.D. 97

Magistrates – jurisdiction – conviction of accused after adjournment, notice of which had not been served on him – no proof of service of notice of adjournment – whether the proceedings were a nullity entitling the magistrates to re-hear the case – or whether the magistrates were functus officio in which event the appropriate remedy would have been an order of certiorari to quash the conviction leaving the information valid and the prosecution free to proceed with it if they saw fit.

The applicant was summoned to appear before the magistrates' court on July 16, 1981, for an offence of speeding. He notified the court that he intended to plead not guilty and the case was adjourned until September 10, 1981. Neither the applicant nor his solicitors received notice of the date of the adjourned hearing and in the absence of the defendant on September 10 the justices convicted him but adjourned sentence until October 8, 1981. When the solicitors learned of the conviction they complained that no notice of adjourned hearing had been received and the justices decided to re-list the case for hearing which finally came before the court on March 11, 1982. On that date the clerk advised the justices that they were functus officio and had no power to re-hear the case. The proceedings were adjourned sine die so that the applicant could apply to the Queen's Bench Division for the appropriate relief by way of judicial review.

On an application for an order of certiorari to quash the conviction, the effect of which would be to leave the information alive and enable the prosecution to proceed with the case if they so wished on the basis of a not guilty plea:

Held: 1. It was incumbent upon the justices before proceeding with the trial on September 10, 1981 in the absence of the applicant and with the knowledge that it was his intention to plead not guilty, to satisfy themselves that not only a notice of the adjournment had been sent by the court, but that it had been received by the applicant. As this was not done, the purported trial on September 10, 1981 was a nullity, and the justices were entitled to restore the case for hearing. Accordingly the court would grant a declaration to that effect.

2. Had the applicant been properly served with a notice that the adjourned hearing was to take place on September 10, 1981, the justices, in convicting him on that date, would have been functus officio and the only power they would then have had was that which they might have exercised within 28 days of the date of conviction under s. 142(2) of the Magistrates' Courts Act 1980 to direct a re-hearing of the case. If in those circumstances the justices had failed to exercise that power, the appropriate remedy would be certiorari to quash the conviction and leave the information valid so that the prosecution could still proceed if they saw fit.

Note: The decision of the Queen's Bench Division as set out in (1) above appears to be on the basis that the magistrates' court either did not send a notice of the adjourned hearing on September 10, 1981 to the applicant, or sent such a notice by ordinary post. Had notice of the adjournment been sent by the court to the applicant in a registered letter or by recorded delivery service it is submitted that under the proviso to r. 99(2) of the Magistrates' Courts Rules 1981 it would not have been necessary for the magistrates to satisfy themselves that the notice had been received by the applicant (the offence of speeding with which he was charged being a summary offence).

R. v. Seisdon Justices. Ex parte Dougan Q.B.D. 177

Magistrates – maintenance order – variation of amount payable under a divorce court order registered in a magistrates' court – remission to original court.

After ordering a lump sum payment of £10,000 to the mother, the divorce court ordered the father to pay £10 per week for each of two children. The order was registered in a magistrates' court. Upon an application four years later by the mother for an increase of those amounts it was shown that the mother's new husband was, by agreement between the parties, paying the children's school fees

at private schools, the father's gross annual income was a little over £10,000, the father looked after the children during access periods, and it was said that the expenditure of each household was on the high side. The father did not give information about a building society account and the mother did not ask any question which would reveal it.

The magistrates dismissed her application for increases in the order. The mother appealed.

Held: As the order was a registered order and there was power to remit the application to the original court, it might have been of advantage if the magistrates had exercised that option to remit. In the reassessment of the positions in the county court there could have been an order for discovery which could have revealed the additional information.

Application remitted to the original county court with a direction for affidavits of means and an order for discovery.

Goodall v. Jolly Fam. Div. 513

Magistrates – power to re-open case to rectify mistakes – constitution of reviewing court under s. 142 of the Magistrates' Courts Act 1980.

On January 11, 1983, the appellant, Robert Charles George Morris, pleaded guilty before a magistrates' court comprising three justices to an offence of driving a motor vehicle on a road when unfit through drink or drugs contrary to s. 5(1) of the Road Traffic Act 1972. He was fined £100 and the justices ordered that his driving licence be endorsed with 10 penalty points in purported pursuance of s. 19 and sch. 7 of the Transport Act 1981. Later realizing that their duty had been to disqualify the appellant under s. 93(1) of the Road Traffic Act 1972 the justices notified him that the case would be re-opened on January 28 with a view to rectifying the mistake. At the re-hearing when the bench consisted of three justices, only one of whom had been involved in the original adjudication, the appellant was fined £100 and disqualified from driving for 12 months. On appeal by way of case stated on the ground that the reviewing court was improperly constituted:

Held: that under s. 142 of the Magistrates' Courts Act 1980 the power to re-open a case in order to rectify a mistake could only be exercised: (1) by a court constituted in the same manner as the original court, i.e. by the same justices; or (2) where, as in the present case, the original court comprised three or more justices, by a court which consisted or comprised a majority of those justices. Accordingly the court sitting on January 28 was improperly constituted, the appeal would be allowed and the original decision restored.

Morris v. Grant Q.B.D. 351

Magistrates – procedure – application under s. 9 of the Guardianship of Minors Act 1971 for order for access to child – hearing followed by adjournment for further investigation – no interim order for access – power of magistrates' court to permit introduction of further evidence at subsequent hearing and to direct a re-hearing before a differently-constituted bench.

A magistrates' court heard a father's application for an order for access to a child of his former marriage and announced that the court would grant access if the terms of access were defined and the access were supervised. The hearing was

adjourned, without any interim order for access, for further inquiries by a probation officer. At the resumed hearing the mother applied, and the magistrates agreed, that she be allowed to call further evidence. They overruled a submission that they had no jurisdiction to reopen the hearing but, to avoid any suggestion that they would not be impartial because they had already reached a provisional conclusion, they directed a re-hearing before a differently-constituted bench.

The father applied for an order of certiorari to quash that decision on the grounds that the magistrates had no power to allow further evidence, that if they had such a power they had exercised their discretion wrongly, and that they had no jurisdiction to order a re-hearing by a new bench.

Held: 1. The appeal was misconceived. When magistrates are exercising their domestic jurisdiction, particularly in relation to the welfare of a child, the criminal law precedents are not appropriate. *Webb v. Leadbetter* (1966) 130 J.P. 277, [1966] 2 All E.R. 114 Q.B.; *Phelan v. Back* (1972) 136 J.P. 298; [1972] 1 All E.R. 901, Q.B. considered.

2. There was no overriding reason why in these circumstances the magistrates should not have proceeded with the case and, after hearing additional evidence, made a final determination on the complaint: *Robbins v. Robbins* (1970) 134 J.P. 550, [1970] 2 All E.R. 742, P.D.A. applied.

3. The decision that the case should be re-heard by a new bench, not overlooking the fact that the original bench had been constituted of two magistrates only and might have been unable to reach a binding decision, had been a careful exercise of the magistrates' judgment and was unassailable.

Per curiam: It is difficult to visualise any circumstances in which, before the final determination of an issue relating to the welfare of a child, it would be proper for magistrates to refuse to hear evidence of potential relevance.

Application refused.

R. v. Leeds Justices. Ex parte Thompson Q.B.D. 129

Magistrates procedure on summary trial whether consent of defendant is necessary to trial together of two or more informations against him whether consent of defendants is necessary to trial together of two or more defendants charged on separate informations with related offences.

The respondents, Terence Edward Clayton and Eileen Annie Clayton, who were husband and wife, were summoned to appear before the Hunstanton magistrates' court in Norfolk in respect of alleged offences under s. 78 of the Post Office Act 1969. A single summons was issued against the husband in respect of three informations, two of which concerned himself alone and the third alleged an offence jointly with his wife. A separate summons was issued against the wife in respect of two informations, one of which charged her alone and the second related to the joint offence with her husband.

When the cases came before the justices, pleas of not guilty were intimated and the cases were adjourned. At the adjourned hearing neither of the respondents appeared and the justices heard all five informations together although no consents were given by or on behalf of the husband or wife to this course, and the respondents were convicted on all five informations. The husband gave notice of appeal to the Kings' Lynn Crown Court and on the appeal, when the validity of the convictions was challenged on the ground that the informations had been tried together without consent, the Judge adjourned the hearing for an application for judicial review to be made.

On an application for judicial review the Queen's Bench Divisional Court quashed the convictions but certified the following two questions of law as of general public importance:

1. whether the consent of the defendant was necessary to the trial together of two or more informations; and
2. whether the consent of the defendants was necessary to the trial together of two or more defendants who were charged on separate informations.

On leave to appeal being granted by the House of Lords:

Held:

1. Although the Divisional Court was bound by authority to quash the convictions, the practice in magistrates' courts should henceforth be analogous to the practice prescribed by the Court of Criminal Appeal in *R. v. Assim* (1966) 130 J.P. 361; 2 Q.B. 249, for trials on indictment. That principle already applied to committal proceedings in magistrates' courts on the authority of *R. v. Camberwell Green Stipendiary Magistrate, ex parte Christie* (1978) 142 J.P. 345, 1 Q.B. 602.
2. Accordingly: (a) where a defendant was charged on several informations and the facts were connected, there was no reason why, if the justices thought fit, the informations should not be heard together; and (b) similarly, if two or more defendants were charged on separate informations but the facts were connected, there was no reason why they should not, if the justices thought fit, be heard together.

   When this question arose justices would be well advised to inquire both of the prosecution and the defence if there was any objection to the informations being heard together. If consent was forthcoming on both sides there was no problem. If it was not, the justices should consider the rival submissions and, under any necessary advice from their clerk, rule as they thought right in the overall interests of justice. If the defendant was absent or not represented, the justices should seek the views of the prosecution and again, if necessary, the advice of their clerk and rule as they thought fit in the overall interests of justice.
3. Absence of consent, either express or when necessarily brought about by the absence of the defendant or the absence of representation, should no longer in practice be regarded as a complete and automatic bar to hearing more than one information at the same time or informations against more than one defendant charged on separate informations at the same time where the facts were sufficiently connected to justify a joint trial and there was no risk of injustice to defendants by its adoption. The justices should always ask themselves whether it would be fair and just to the defendant or defendants to allow a joint trial and only if the answer was clearly in the affirmative should they order joint trial in the absence of consent.
4. In the present case the two certified questions would be answered in the negative and the cases remitted to the Crown Court to continue with the hearing of the appeals.

R. v. Hunstanton Justices. Ex parte Clayton (T.E.); R. v. Hunstanton Justices. Ex parte Clayton (E.A.) H.L. 161

Magistrates – variation between information and evidence in relation to place where offence committed – whether s. 123 of the Magistrates' Courts Act 1980 authorizes court to proceed with or without amendment of information.

The two respondents, Julian David Peck and Nathan Barry Jones, were charged on informations alleging that on April 20, 1982, at Guildhall Street, Cambridge, they stole a bicycle. On the summary trial the justices found on the evidence adduced that when the respondents took the bicycle from Guildhall Street they did not have the necessary intent to steal it and that their theft did not take place until later on in the day at St. Andrews Green, Cambridge. Accordingly the justices dismissed the informations. On appeal by way of case stated:

Held: that under s. 123(1) of the Magistrates' Courts Act 1980 there could be no objection to the variance between the information and the evidence adduced and that on the authority of *Garfield v. Maddocks* (1973) 137 J.P. 461; [1974] 1 Q.B. 7, as the variation was slight and did no injustice to the defence, the justices should have convicted the respondents on the charge laid down against them. Accordingly the case would be remitted to the justices with a direction to convict.

Creek v. Peck and Jones Q.B.D. 537

Magistrates' court – enforcement of order for periodical payment of money – court intending to remit sums due under the order – effect of failure to give notice under Magistrates' Courts Rules 1981, r. 44.

Judicial review – application under R.S.C. O. 53 in respect of matrimonial and family type orders should include a request for hearing by a Judge of the Family Division.

A magistrates' court hearing proceedings under the Magistrates' Courts Act 1980, s. 76, for the enforcement of arrears under an order enforceable as an affiliation order proposed to exercise the power under s. 95 of that Act to remit the arrears. The person entitled to the benefit of the order was not aware of the court's intention, but the court remitted the arrears without giving notice in accordance with the Magistrates' Courts Rules 1981, r. 44. The person entitled to the benefit of the order applied for judicial review of the proceedings and the application was heard in the Queen's Bench Division before a Judge of that Division.

Held: The court's failure to comply with r. 44 deprived the applicant of the right to have her representations considered before the court exercised its discretion to remit, and the matter should be returned to the magistrates' court for reconsideration:

Order of certiorari granted and decision to remit the arrears quashed.

Per curiam: When judicial review is sought in respect of a matrimonial or family type order, the application should include a request that it be heard by a Family Division Judge rather than by a Queen's Bench Division Judge in the normal way.

R. v. Dover Magistrates' Court. Ex parte Kidner Q.B.D. 254

POLICE

Powers of justices on their own initiative to dismiss cases, on grounds of alleged injustice, without hearing any evidence.

Birmingham justices dismissed an information against Paul Martin Raitt on June 23, 1982, and against Sheila O'Regan on June 3, 1982, and applications for judicial review of their decisions were made seeking orders of certiorari and mandamus in each case. The facts are summarized as follows:

(a) In the case of Paul Martin Raitt:

The defendant, Paul Martin Raitt, appeared unrepresented before the court on May 5, 1982, along with a co-defendant named Marston, on a charge of obtaining a meal by deception contrary to s. 15(1) of the Theft Act 1968. He wished to plead guilty but on hearing the facts of the case as outlined by the prosecution and the defendant's mitigation, the justices took the view that the plea was equivocal and directed a plea of not guilty to be entered. Both defendants were remanded on bail until June 9, when Raitt appeared but Marston did not. Raitt was further remanded on bail to June 23, and a warrant was issued against Marston who was arrested and brought before the court on June 15, when he was remanded to July 7.

When Raitt appeared before the court on June 23 he again said he wished to plead guilty but he denied any criminal intent and again the justices directed that a not guilty plea should be entered. In view of the fact that two Benches had declined to accept the defendant's plea of guilty, the justices were of opinion that it would be difficult for the prosecution to prove criminal intent, and therefore invited the prosecuting solicitor to take fresh instructions, taking the view that it would be unjust to prolong the distress to the defendant if there was a doubt. The case was stood down for the prosecutor to check on the availability of witnesses so that the hearing could proceed that day, but as the main witness was not available the prosecutor was unable to offer any evidence. The justices dismissed the information against Raitt being of the opinion that the continuation of the proceedings was prejudicial to him.

(b) In the case of Sheila O'Regan:

The defendant, Mrs. Sheila O'Regan, who was not represented, had pleaded not guilty at an earlier hearing to a charge of careless driving and the case was listed for trial on June 3, 1982, when she and all the witnesses on both sides attended. The case was expected to take 1½ hours (although the chairman of the Bench in his affidavit said he was informed it would be three hours) but as other cases in the court list were taken first, including one which involved six defendants, Mrs. O'Regan's case was not called until just before 12 noon. It was apparent that the case would not be completed by the end of the morning session and there were practical reasons why it could not be continued before the same Bench in the afternoon or be dealt with by a newly constituted Bench then. The prosecuting solicitor asked for the case to be adjourned to a special court, but the defendant who had been on the court premises since 9.45 a.m. objected.

The justices took the view that the prosecution had been at fault in relation to the delay in calling the case on, that it would be unjust to part hear the case, and that any adjournment would have to be over a long period. Accordingly, they refused the application for the adjournment and dismissed the case on the basis that it would have been unjust to continue.

Held: 1. The law does not permit cases, on grounds of supposed injustice, to be dismissed out of hand without hearing any evidence. In the magistrates' court there is no power which enables the magistrates to dismiss a summons simply on the basis that it would be, in the words of the chairman (in *O'Regan's* case) "unjust to let it continue" and in the words of the other chairman (in *Raitt's* case) "that the continuance of the proceedings was prejudicial to the defendant".

2. Although the grounds for mandamus and certiorari in each case were established, the court would exercise its discretion not to make the orders sought.

having regard to the circumstances in each case including the delays already incurred in the proceedings and the fact that if the cases were sent back to the magistrates' court the hearings would be so delayed that the recollections of the witnesses would be less reliable.

R. v. Birmingham Justices. Ex parte Lamb Q.B.D. 75

Police - Dismissal of constable - Need for due consideration and determination of allegations against constable - No discretion to be exercised arbitrarily - Police Regulations 1971, reg 16(1).

In 1977 the respondent applied to join the S.W. police. In September of that year he was accepted into the force and began his initial course of training. He obtained satisfactory reports, but later a number of statements regarding him were made by some officers to the chief constable, one being that he was plausible and possibly dishonest and another that his wife dressed in "hippy" clothes. None of these matters was brought into the open so as to enable the respondent to deal with them if he so wished, and on November 8, 1978, he was told by the chief constable that he had made a mistake in accepting him into the force and he would give him an opportunity to resign as an alternative to his being dismissed. The respondent asked if he could have a reason for this action but this the chief constable refused outright. As a result the respondent signed a formal letter of resignation, but he then applied to the court for a judicial review of the chief constable's decision on the ground that he had been treated unfairly and in a manner contrary to natural justice. Woolf, J., held that the decision reached by the chief constable did not accord with the standards of fairness that should have been observed, but held that no relief should be granted except with regard to costs. The Court of Appeal confirmed that conclusion but added a declaration that the chief constable's decision to require the respondent to resign or be dismissed was void. The chief constable swore an affidavit in those proceedings asserting that reg. 16 of the Police Regulations, 1971, gave him an absolute discretion to dispense with a probationer's services.

Held: it was plain from the wording of reg. 16 that the power of a chief officer of police to dispense with the services of a person who had been accepted as a probationer was only to be exercised after due consideration and determination of the specific matters raised, it was not a discretion which might be exercised arbitrarily and without accountability, that was the protection afforded to every servant who was employed under a contract of service, so he was protected against unfair dismissal, and no less protection should be afforded to a probationer constable; in the present case the chief constable made the fundamental mistake of assuming that he had an absolute discretion to discharge the respondent under reg. 16, a right to dismiss him at pleasure; his mistake tainted his decision-making process; it was implicit in reg. 16 that his discretion to discharge was a qualified one, exercisable only if he considered that the respondent was not fitted to perform the duties of the office or was not likely to become an efficient constable or a well conducted constable; it was the duty of the chief constable to deal fairly with the respondent regarding the factors on which he was proposing to act.

Chief Constable of the North Wales Police v. Evans H.L. 6

PUBLIC HEALTH ACTS

Public health - requirement of local authority's consent for establishment of offensive trades - provision for consent to be in writing - whether provision mandatory or directory - Public Health Act 1936, ss. 107(1) and (2), and 283(1).

In 1958 the appellant company's predecessor established six offensive trades in certain premises. The consent of the relevant local authority (being the predecessor of the present respondent authority) was not sought but in fact both local authorities in turn were not only aware of the existence of the offensive trades but also supervised them and made suggestions as to the manner of their conduct. In 1978 the respondent local authority served notices requiring the discontinuance of the offensive trades. The appellant company failed to comply and the respondent local authority obtained a total of 12 summonses in respect of the conduct of each of the offensive trades on September 21, 1978 and on June 15, 1981, without consent in writing having been obtained. On July 7, 1981, the justices convicted the appellant company of all 12 offences and ordered it to apply for consent in writing before November 10, 1981. In respect of each of the six offences in 1978 the justices imposed a fine of £5 per day, operative from November 10, 1981. In respect of the other offences the justices ordered absolute discharges.

On appeal, the Divisional Court upheld the convictions but set aside the fines, on the basis that the justices had no power to fix a rate of fine to take effect in the future, and remitted the matter to the justices to impose such penalty as they might feel appropriate.

On appeal to the House of Lords against the decision of the Divisional Court to uphold the convictions,

Held: where offensive trades have been carried on without the consent in writing, but with the knowledge, consent and approval, of the local authority, an applicant who subsequently seeks consent in writing will have strong grounds for expecting a grant which will legitimise his activities for the future. Nevertheless, the consent of the local authority, as required by s. 107(1) of the Public Health Act 1936 for the establishment of offensive trades must be given in writing in accordance with s. 283(1) of that Act, because this was the clear effect of s. 112 of the Public Health Act 1875 (which was replaced by the provisions presently under consideration) and, moreover, it was important that prosecution, defence and magistracy must be able to determine whether or not an offence has been committed without recourse to vague or disputed recollections regarding events or conversations.

Epping Forest District Council v. Essex Rendering Ltd. H.L. 101

RATING AND VALUATION

General rates - enforcement in default of sufficiency of distress - inquiry into means of defaulter before issue of warrant of commitment - term of imprisonment fixed after means inquiry and issue of commitment postponed on conditions - procedure on failure of defaulter to comply with conditions - whether further inquiry into his means necessary before warrant of commitment is issued - ss. 102 and 103 of the General Rate Act 1967.

The rating authority sought a warrant of commitment against the applicant, Derek Arthur Lucas Fleet, in default of sufficiency of distress and the justices, having conducted an inquiry into his means in accordance with s. 103(1)(a) of the General Rate Act 1967, fixed a term of imprisonment and postponed the issue of the warrant on condition that he paid £50 weekly off the arrears. Having paid that sum for some time the applicant got into serious financial difficulty as a result of which he was wholly unable to pay the £50 per week which he had offered. He wrote to the court explaining his position but the justices issued the warrant of commitment in respect of the balance due without making a further inquiry in his presence as to the reason for his failure to pay. On application for a judicial review:

Held: 1. Where, following an inquiry into a rate defaulter's means under s. 103(1) of the General Rate Act 1967, a term of imprisonment was fixed and the warrant of commitment postponed on conditions, then the warrant of commitment could only be issued thereafter on application being made to the court by the rating authority whose duty it was to satisfy the justices that the conditions had not been complied with. On such an application being made it was the duty of the justices under s. 103(1)(a) of the Act to inquire in the rate defaulter's presence as to whether his failure to pay was due to wilful refusal or culpable neglect.

2. The decision in *R. v. Chichester Justices, ex parte Collins* (1982) 146 J.P. 109, 237; [1982] 1 All E.R. 1000 to the effect that in enforcement proceedings for non-payment of a fine there was no necessity to give notice to the offender before a warrant of commitment was issued following his failure to comply with the conditions subject to which the issue of the warrant had been previously postponed under s. 77(2) of the Magistrates' Courts Act 1980, did not apply to the enforcement of rates under the General Rate Act 1967.

3. Accordingly the application succeeded and certiorari would issue to quash the issue of the warrant of commitment and an order of mandamus would go to direct the justices, if the rating authority applied for the postponed warrant to be issued, to conduct an inquiry in the presence of the applicant as required by s. 103(1)(a) of the General Rate Act 1967.

Per curiam: The scheme under the Magistrates' Courts Act 1980 is quite clearly aimed at dealing with a situation where the magistrates have in fact imposed some kind of a fine . . . adjudged to be paid not to anybody but paid into the magistrates' court. The result is that the court is in no difficulty in discovering whether or not the conditions under which it postpones the issue of a warrant have been satisfied. . . . If the court has only got to look up its records to discover whether money has been paid or not, then no further intervention by anybody else is required. But where, as under the General Rate Act 1967, it is incumbent upon the rating authority to lay before a magistrates' court or its clerk evidence that the condition has not in fact been complied with, . . . there must be an opportunity to be heard, otherwise the position is wholly contrary to natural justice.

R. v. Poole Justices. Ex parte Fleet Q.B.D. 330

Rating Law – distress proceedings – jurisdiction of magistrates' court to investigate who is in rateable occupation of premises – inability of an unincorporated association, or one of its prominent members, to be in rateable occupation of premises used for the purposes of the association – General Rate Act 1967, ss. 7, 96 and 97.

The appellant, Richard Verrall, was a prominent member of the National Front, an unincorporated association. Certain premises were owned by National Front

Properties Limited and used by the unincorporated association as its headquarters. When rates for three consecutive years had been demanded from the appellant but remained unpaid, the respondent rating authority obtained a summons requiring the appellant to show why he had not paid. The appellant contended he had not been the occupier of the premises at the material times and therefore was not liable for the rates. The stipendiary magistrate found that the appellant was a prominent member of the unincorporated association, having responsibility for its administration. Accordingly, a distress warrant was issued on the ground that the paramount occupier of the premises was the unincorporated association and the appellant had expressly or impliedly authorized or ratified the occupation of the premises by the association. On appeal by way of case stated, Woolf, J., followed three recent decisions at first instance [*North Cornwall District Council v. Johnson* (1981) R. & V.R. 201, *Bird v. Blakemore* (1982) R.A. 12, *Newport Borough Council v. Williams* (1982) R. & V.R. 169] to the effect that the question whether or not the person summoned had been the rateable occupier is not a matter within the jurisdiction of a magistrates' court, but is properly a matter for appeal to the Crown Court under s. 7 of the General Rate Act 1967. His Lordship then declined to deal with the case on its merits, leaving the whole matter for the consideration of the Court of Appeal. On appeal,

Held: (i) the three recent decisions at first instance, supra, were contrary to authority, were wrong and should not be followed; accordingly the magistrate did have jurisdiction to inquire whether the person summoned was in rateable occupation; and

(ii) where premises are used by an unincorporated association, that association cannot be said to be in rateable occupation of those premises.

(iii) most unincorporated associations, such as clubs or charities, have trustees, or a committee, legal persons with funds available to pay the rates which have to be paid. It is these persons who, as a matter of law, usually occupy the relevant premises which are used for the purposes of the unincorporated association and are liable as such occupiers for the general rates. The mere fact that a person is a "member" of an unincorporated association is insufficient material upon which to base a finding that that person is the occupier of premises used for the purposes of the unincorporated association, either himself alone, still less jointly with the association;

(iv) on the facts given in the case stated, it was impossible to hold that the appellant was the occupier or a joint occupier of the premises in question. It was also unlikely that, if the case was remitted to the magistrates' court, the respondents would be able to satisfy the stipendiary magistrate by further evidence or argument that the appellant was the exclusive occupier of the whole hereditament for the relevant period so as to be entitled to the distress warrant sought. Accordingly, the case would be remitted to the magistrate with a direction to dismiss the summons against the appellant.

Verrall v. The Mayor and Burgesses of the London Borough of Hackney C.A. 41

Rating Law – liability of husband who has left the matrimonial home to pay rates in respect of those premises while they are occupied by his wife and children – s. 103 of the General Rate Act 1967.

In October 1978, following a matrimonial dispute, the ratepayer left his wife and children who remained in physical occupation of the matrimonial home. The ratepayer himself remained the tenant of the premises until May 1980 when the

landlord proceeded to recover possession of the premises as against the ratepayer. During the period between the ratepayer's departure from the matrimonial home and the landlord's recovery as against him, the ratepayer never physically returned to the premises. There was no order of any court excluding him from the premises, but in the course of divorce proceedings he had given an undertaking to remain away from the premises. Immediately after this undertaking had been given, the wife started to cohabit in the premises with another man, but at the material time the marriage between the ratepayer and his wife remained in being and the ratepayer remained liable, under an order of the divorce court, to maintain his wife and children.

In March 1982 the rating authority applied to the justices under s. 103 of the General Rate Act 1967 for the committal to prison of the ratepayer in consequence of non-payment of rates in respect of the matrimonial home. The justices found that: (1) the ratepayer was not in beneficial occupation of the premises and that he was not, therefore, liable for rates; (2) it would be superfluous to conduct an inquiry into his means; and (3) the rates should be remitted.

At the hearing before them, the justices' attention was not drawn to the case of *R. v. Oundle and Thrapston JJ and Delaney, ex parte East Northamptonshire District Council* [1980] R.A. 232.

The rating authority applied for certiorari to quash the decision of the justices.

Held: 1. The *Oundle* case established that the justices had no power to remit the rates unless they found that there was inability to pay. In the present case, therefore, the justices had erred because they had ordered remission without an inquiry into means.

2. There was no previous decision of the courts directly on the present facts, but following the spirit of the law as determined by cases such as *Cardiff Corporation v. Robinson* (1957) 120 J.P. 500; [1957] 1 Q.B. 39 and *Routhan v. Arun District Council* [1981] 3 All E.R. 752, it could be said that, after decree absolute when a husband has left the matrimonial home permanently, the marriage having been finally dissolved, and the wife remains, she would then be the sole occupier unless there were very special circumstances justifying a contrary conclusion. However, where, as in the present case, the marriage still subsists and the husband remains under an obligation to maintain his wife and children in the matrimonial home, he must be regarded as occupying the house for rating purposes. The fact of the wife's cohabitation with another man was irrelevant. Accordingly the decision of the justices would be quashed and the case remitted to them for further consideration.

R. v. Harrow Magistrates' Court. Ex parte London Borough of Harrow Q.B.D. 379

ROAD TRAFFIC ACTS

Driving with excess alcohol – shortness of distance driven – whether special reason for not disqualifying.

At 10.45 p.m. a police officer saw the respondent attempt to reverse a car from a parked position on the road. The car showed no lights, the car mounted the pavement twice and stalled twice. The officer spoke to the driver, smelt alcohol on his breath and administered a breath test which proved positive. Later analysis showed his level of alcohol to be 204 mg. in 100 ml. of blood. He knew at the time of arrest that he had consumed too much alcohol and intended not to drive home but to move the car 200 yards to a car park. Justices accepted these as special reasons not to disqualify and the prosecutor appealed by way of case stated.

Held: The point was covered by *Coombes v. Kehoe* (1972) 136 J.P. 387; [1972] 2 All E.R. 55 which confined *James v. Hall* (1972) 136 J.P. 385; [1972] All E.R. 59 to its own very special circumstances. It was difficult to distinguish the facts of this case from *Coombes v. Kehoe* except that here there was no finding of fact that this was a busy road. However, it could not be said that there was here no potential danger: there was a public house nearby and even at that time at night there must have been traffic on the road or the likelihood of it. The justices erred in attaching too much importance to the actual distance driven — the distance he intended to drive was significant.

Haime v. Walklett Q.B.D. 570

Motorist found in stationary vehicle – admits glue-sniffing – arrested for being unfit to drive through drink or drugs – whether "toluene", a constituent of glue with a narcotic effect, capable of being a drug for purposes of s. 5(2) of the R.T.A. 1972.

Police found the appellant slumped over the steering wheel of a stationary car in the small hours. No lights were displayed. He held a plastic bag over his face and admitted having sniffed glue. A tin of glue was found in the car. On arrest the appellant was dazed and incoherent. A police surgeon examined him and concluded he was under the influence of drink or drugs to such an extent he could not have proper control of the car. The bag and tin of glue were found to contain a solvent toluene which when inhaled had effects similar to a narcotic and caused giddiness, lightheadedness and other results similar to those of alcohol. He was convicted by justices of an offence contrary to s. 5(2) of the Road Traffic Act 1972 and appealed by way of case stated, the question being whether the constituent chemicals of the glue, and in particular toluene were a drug for the purpose of that section when deliberately inhaled.

Held: Notwithstanding the appellant's submission that it could not be so described as the Misuse of Drugs Act 1971 made no reference to toluene, toluene could amount to a drug. The definition mentioned in *Armstrong v. Clark* (1957) 121 J.P. 193; [1957] 1 All E.R. 433, that a drug was a medicant was not exhaustive. In common sense, and bearing in mind the purpose of s. 5(2), any substance taken into the human body by whatever means, not taken as food or not being a drink [as drink is specifically mentioned in the section] which affects the control of the human body may be regarded as a drug for this purpose.

Bradford v. Wilson Q.B.D. 573

Road Traffic – accident – driver unaware – written notice of intended prosecution not served – interpretation of s. 179(3A) of the Road Traffic Act 1972 – whether knowledge of accident needed by driver.

The respondent was acquitted of driving without due care and attention after an accident which occurred when he reversed from his own drive. The justices found that he was unaware of the accident and at no time was a "notice of intended prosecution" within the meaning of s. 179 of the Road Traffic Act served nor was a summons served upon him within 14 days, although he was seen by a police officer two and a half hours after the accident. Four days later the same officer told him orally he would be reported for consideration of prosecution. The justices found

that he was unaware of the accident and dismissed the information on the ground that s. 179(3A) of the Road Traffic Act 1972 only applied if a defendant was aware that an accident had occurred. (The subsection removes the need to serve a summons or notice of intended prosecution or to give a warning of prosecution at the time of the alleged offence in cases where an accident has occurred). The prosecutor appealed and submitted that the need to be aware of an accident was immaterial as the statute made no mention of it. Had it been the intention of Parliament to require knowledge of the driver then it would have been a simple matter to insert that into the subsection, particularly in the light of the decision in *Harding v. Price* (1948) 112 J.P. 189; [1948] 1 All E.R. 283. Furthermore, s. 173(3A) imposed merely a procedural duty upon the prosecutor while *Harding v. Price* concerned a case where the defendant was under a duty to perform a certain action after an accident. The respondent submitted that the purpose of the section in question was to alert the motorist at the earliest opportunity to the fact that his conduct would be called into question.

Parliament could not have intended to remove that protection unless it did so explicitly.

Held: The point was a nice one about which it was possible to take either view without straining the words of the subsection. As there was room for doubt, the court should lean towards the protection of the subject and the respondent's submission was correct. It did not follow that because subs. 3A was enacted after *Harding v. Price* that Parliament considered the possibility of accidents of which a driver was unaware.

Per curiam: the court does not like implying into any part of a statute words that are not there unless it is really necessary to do so.

Bentley v. Dickinson Q.B.D. **526**

Road Traffic – failure to inflate breathalyser on first attempt – arrest based upon a second breathalyser test valid – wording of s. 8(4) of the Road Traffic Act 1972 directory not mandatory – police behaviour not oppressive or amounting to harassment – Road Traffic Act 1972, s. 8(4).

In the first appeal, the appellant, Revel, was stopped by police when he was seen driving in an erratic manner. The police suspected that he had been drinking and required him to take the breathalyser test. The appellant only partially inflated the breathalyser. The police gave him the opportunity to inflate a second breathalyser, which he duly did. The test was positive. Eventually, after the prescribed procedure was carried out, the appellant was found on analysis to have 131 mg of alcohol on 100 ml of blood. The appellant was charged and convicted of an offence under s. 6(1) of the Road Traffic Act 1972.

In the second appeal, the appellant, Hillis was stopped by the police after they suspected he had been drinking. Hillis was required to take the breathalyser test, but was unable fully to inflate it. After a short puff, he handed the breathalyser back to the police constable saying he suffered from asthma. The police gave him the opportunity to inflate a second breathalyser, which again he was unable to do. The appellant was arrested. Eventually, after the prescribed procedure was completed, the appellant was found to have 302 mg of alcohol in 100 ml of urine. The appellant was charged and convicted of an offence under s. 6(1) of the Road Traffic Act 1972.

Both appellants submitted that s. 8(4) of the Road Traffic Act 1972 only gives the police power to require one specimen of breath and that consequently their

arrest based on the second requirement to provide a specimen was invalid, therefore vitiating the proceedings.

Held: the wording of s. 8(4) of the Road Traffic Act 1972 is permissive, not mandatory, in that the power to arrest need not be exercised on failure to provide a specimen of breath. Nothing in the statute prevents an officer from exercising his discretion not to arrest but to require a second breath test. There is no question of harassment or oppressive behaviour by the police and the cases of *Spicer v. Holt* (1976) 140 J.P. 545; [1976] 3 All E.R. 71, *Gwyn-Jones v. Sutherland* [1982] R.T.R. 102, *R. v. Hyams* [1973] 1 W.L.R. 13, are clearly distinguishable. The facts of the cases are covered by *R. v. Broomhead* [1975] 558, where a constable was held to be entitled to arrest a defendant after his second breath test when the first had been abortive.

Appeals dismissed.

Revel v. Jordan; Hillis v. Nicholson Q.B.D. 111

Road Traffic – driver in driving seat of car – allows car to roll down the hill without engine running – no keys in ignition – car collides with other vehicle – whether driver driving or not.

The appellant was sitting behind the steering wheel of his car, having dropped a friend off. He thought he still had the keys in the ignition and allowed the car to roll forward in order to drive off carefully. He suddenly realized he had no key, the steering lock locked, he put on the brakes but the car moved some 30 feet by force of gravity and collided with another vehicle. A police officer found the appellant trying to unlock the steering with a number of house keys and breathalysed him with positive results. The appellant was convicted by the justices and appealed unsuccessfully to the Crown Court and thence by case stated to the Queen's Bench Division, the ground of appeal being that he was not driving but attempting to drive. The appellant submitted that there were three ingredients for driving: (1) operating the engine; (2) steering the car; and (3) braking. As the engine was not running he could not therefore be said to be driving but was attempting to drive. The appellant accepted that the leading case on the meaning of driving was *R. v. McDonagh* (1974) 138 J.P. 488; [1974] 1 Q.B. 448.

Held: Following *R. v. McDonagh* the essence of driving was the use of the driver's controls in order to direct the movement of the car, however the movement was produced. It was not the case of the car moving of its own volition because the brakes had ceased to operate but was a case of the appellant himself deliberately setting the car in motion. The decision would not necessarily be different, even if the former were the case, but the fact that he set it in motion made the position stronger. That the steering was momentarily locked did not prevent the appellant from driving the car. The case should be distinguished from *Jones v. Pratt* (decided on June 11, 1982 by the same Court) where a passenger suddenly grabbed the steering wheel and was held not to have been driving. The case could also be distinguished from *Kelly v. Hogan* [1982] R.T.R. 352 where a defendant unfit to drive through drink was sitting in the driving seat of a stationary motor car on a public road and was unable to start the car as none of the keys fitted. He was convicted of attempting to drive and in that case the vehicle was at all times stationary. In the present case it had deliberately been set in motion by the appellant. These cases were essentiallt cases of fact and degree and the justices were entitled to find that he was driving in the ordinary sense of the word and the Crown Court was correct in dismissing the appeal. Appeal dismissed.

Burgoyne v. Phillips Q.B.D. 375

Road traffic – motorist required to take breath test after having been stopped by police in a "routine crime check" – police acting lawfully and in the course of their duties when stopping the motorist for such a check – police's common-law duty to prevent crime – Road Traffic Act 1972, ss. 6(1), 8(1), 159.

The appellant was required to stop by police officers for a random check, the vehicle being driven in a good class residential area after midnight, with two male occupants, bearing a registration mark that was not local. When a police officer in uniform spoke to the appellant, who had been driving, he smelt alcohol on his breath and required him to take a breath test pursuant to s. 8(1) of the Road Traffic Act 1972. The test was positive. The appellant was arrested and subsequently, following the prescribed procedure, gave a specimen of blood which laboratory analysis revealed contained 90 mg of alcohol in 100 ml of blood. The appellant was charged and convicted at Guildford Magistrates' Court of an offence under s. 6(1) of the Road Traffic Act 1972. The appellant appealed by way of Case Stated to the Divisional Court submitting that the stopping was unlawful as the police officer was not entitled to stop the appellant for a random crime check.

Held: the powers of the police at common law although not precisely defined, were expressed in *Rice v. Connolly* (1966) 130 J.P. 322 to include all steps which appear necessary for keeping the peace or preventing crime or for protecting property from criminal injury. The officer was acting in pursuance of his common law powers in requiring the appellant to stop and was therefore acting lawfully in the execution of his duty. This was by virtue of his power of common law and not by virtue of any power contained in s. 159 of the Road Traffic Act 1972. It was not necessary to consider the position if the officer had acted in excess of his powers although this point had been considered in *Winter v. Barlow* (1980) 144 J.P. 77 and *Such v. Ball* [1982] R.T.R. 140 which are readily distinguishable from *Morris v. Beardmore* (1980) 144 J.P. 30, 331 and *Finnigan v. Sandiford* (1981) 145 J.P. 440 where the motorists were no longer driving but had reached home. In the present case there was nothing oppressive in the behaviour of the police officer in stopping the strange car late at night in a residential area. The conduct of the officer was lawful: the requirement to provide a specimen of breath was made and the procedure thereafter had been correctly followed. The appeal would be dismissed.

Per Curiam Section 159 of the Road Traffic Act 1972 imposes a duty upon a motorist to stop when required to do so by a constable in uniform. It does not follow that a constable in uniform must be deemed to act lawfully when, for whatever reason, he requires a motorist to stop; for purely practical reasons, there must be a rule that motorists stop when called upon to do so by a constable in uniform. The motorist must assume for the purpose of stopping that he is being lawfully required to stop, otherwise a dangerous and chaotic state of affairs would result. But once the motorist has stopped he can, thereafter, challenge the constable's right to stop him, for nothing in the wording of the section gives any power to the constable to stop the motorist. It is a section designed to ensure safety and good order rather than confer any specific power on a police constable.

Steel v. Goacher Q.B.D. 83

Road Traffic – speeding contrary to ss. 78(1) and 78A Road Traffic Regulation Act 1967 – Muniquip device – whether negated by opinion evidence of motorist.

The appellant, a police officer, was operating a Muniquip radar speed meter on a road in Sutton. He formed the opinion that a vehicle driven by the respondent was exceeding the speed limit and checked it with the Muniquip device. It registered 55 m.p.h. He stopped the respondent and showed him the speed on the meter. The meter had been checked and found to be accurate. This evidence was not challenged by the respondent who in his own evidence said that he did not check his speedometer but believed his speed to be about 30 m.p.h. as he was about to turn off at a nearby junction. The justices dismissed the information and the prosecutor appealed. In stating their case, the justices said that although a Muniquip meter may provide corroboration in a case of speeding they felt the corroboration was not of sufficient quality in this case. The respondent was believed to be telling the truth in stating that he believed his speed to be about 30 and not 55 m.p.h. There was no other vehicle in the vicinity which might have affected the reading on the meter. The question asked by the justices was whether their decision was perverse or wrong in law in finding there was insufficient evidence of corroboration.

Held: Having regard to the evidence, the justices were wrong in law to find there was insufficient evidence of corroboration. They found that the device had been checked and found to be working correctly. It was not inconsistent that the machine should accurately record a certain speed and that the witness should honestly hold the opinion that the vehicle was being driven at a lower speed. The fact that the justices believed the respondent was telling the truth in expressing an opinion did not contradict the evidence of the machine. The question of the justices was answered in the affirmative.

Burton v. Gilbert Q.B.D. 441

Road Traffic Act 1972 – s. 6(1) – driving with excess alcohol – meaning of reasonable cause to suspect driver of having alcohol in the body – suspicion arising from facts not connected with the driving of a vehicle.

On Friday, June 13, 1981, a police constable investigating a burglary spoke to the appellant as he alighted from his car and noticed he smelt strongly of drink. The following day, in the course of the same inquiry he was told that the appellant habitually went drinking at lunch time on Saturdays and Sundays and went out to a public house by car. The officer then returned to the police station to collect a breathalyser and invited another officer to accompany him and returned to the vicinity of the appellant's home. On the return of the appellant he was immediately stopped and the officer smelt alcohol on his breath. The officer invited him to take a breathalyser test, he did so and the usual procedure followed with the result that on analysis the appellant's blood was found to contain 99 mg. of alcohol in 100 ml. of blood. He was convicted by the justices who were satisfied as to the lawfulness of the stopping by the officer.

On appeal by way of case stated, the question for the court was whether the suspicion of driving with excess alcohol could lawfully be formed upon facts which did not stem from the driving of a motor vehicle.

Held: all the cases referred to in argument involved suspicions formed by officers arising from the circumstances of the relevant journey, namely that which culminated in the stopping by the officer, even if the information giving rise to the suspicion was passed on by another officer or a member of the public in respect of that journey. They could therefore be disregarded for the purpose of this appeal. It was, however, a very dangerous extension of the law to permit a reasonable

suspicion to be founded upon facts wholly unconnected with the driving at the relevant time. The risk of harassment if that were so was obvious, and none of the cases cited gave authority for it.

Conviction quashed — appellant's costs from central funds.

Monaghan v. Corbett Q.B.D. 545

Road traffic – valid arrest under s. 8 of the Road Traffic Act 1972 – procedure correctly followed – specimen given under s. 9 – each specimen validly analysed – appellant's figure 96 mg – respondent's figure 83 mg – normal laboratory practice to reduce level by 6 mg – whether motorist above or below limit.

The respondent was arrested under s. 8 of the Road Traffic Act 1972 and specimens of blood for analysis were taken in the usual way. The prosecution's analyst produced a figure of not less than 90 mg of alcohol in 100 ml blood, the average contents being 96 mg and 6 mg being deducted as standard laboratory practice to allow margin for error. The respondent's analyst found the figure of 83 mg but did not make a similar deduction. The justices had regard to the normal laboratory practice and could not be certain that as one figure would therefore come below 80 mg that the respondent had an excess of alcohol. Accordingly the information was dismissed. The prosecution appealed by way of case stated and the question raised was whether the justices were entitled to have regard to the normal laboratory practice of allowing a margin of 6 mg for error.

Held: The justices having concluded that no criticism could be made of the respondent's analysis, the prosecution could not establish that the concentration was higher than that figure. The prosecution's evidence established that it was normal laboratory practice to reduce the figure by 6 mg to allow for error. If this deduction were made it would bring the respondent's figure below 80 mg and the justices were perfectly entitled to say that they could not be satisfied beyond reasonable doubt that no deduction should be made. The appeal would be dismissed.

Walker v. Hodgkins Q.B.D. 477

Section 9 of the Road Traffic Act 1972 – specimen of blood contains more than prescribed limit of alcohol – sample contains micro-organisms capable of producing alcohol but unlikely to have done so significantly unless motorist had diabetes – no evidence from motorist – whether court able to be satisfied appellant had consumed excess alcohol.

The appellant was stopped by a police constable who smelt alcohol on his breath and required him to take a breath test. He agreed to do so — it proved negative and he was arrested for failing to provide a specimen of breath. The usual procedure followed and he agreed to give a sample of urine. The analyst gave evidence by written statement under s. 9 of the Criminal Justice Act 1967 which was wholly accepted by the appellant. It showed that not less than 205 mg. of alcohol was present in 100 ml. of urine. It went on to show that further examination showed the urine sample to be contaminated with micro-organisms capable of producing alcohol. However, in the opinion of the analyst, it was unlikely that the organisms present contributed significantly to the alcohol found

in the specimen unless the motorist had diabetes. The appellant gave no evidence and the magistrates convicted. He appealed by way of case stated. The magistrates were of opinion that it was not for the respondent to prove that the appellant had or had not diabetes. The appellant submitted that the only evidence for the magistrates was the certificate of the analyst. If the appellant was diabetic — about which there was no evidence one way or the other — then it was clear that the condition might well have significantly contributed to the alcohol level to the extent that it could account for the excess above the permitted maximum. If he was not a diabetic the certificate merely said it was unlikely that the organisms contributed significantly. In neither event could the magistrates be satisfied so that they could properly say they were sure the offence had been committed.

Held: The appellant's submission was correct and the conviction would be quashed.

Collins v. Lucking Q.B.D. 307

Section 25 of the Road Traffic Act 1972 – duty to stop after accident and to report accident to constable – whether requirement to stop imposes further duty to seek owner of other vehicle – meaning of "as soon as reasonably practicable".

The appellant collided with a parked car at 2.30 a.m. causing extensive damage to it and to his own. He left his car and having walked in different directions for some minutes returned to the cars. He could not see anybody and did not go to any houses to make inquiries but walked home. He then telephoned a detective constable colleague and asked him to call at his home as he thought he might need medical attention. The colleague did so and started to drive him to hospital, passing the scene which was deserted. The appellant changed his mind, went to the colleague's home, stayed an hour and decided to return to the scene to leave an explanatory note on his car. On doing so he saw people by the cars and decided not to stop. Returning to his colleague's house he telephoned a garage to request a mechanic to go to the scene to leave a note of his details on the car. This was at 4.45 a.m. and at 5.30 a.m. officers saw him at the house and took him to the police station where he reported the accident in response to an inquiry. Justices convicted him of failing to stop on the ground that he did not stop long enough at the scene, adding that it would not be unreasonable for him to make inquiries at the house outside which the car had been parked. He was convicted of failing to report, the justices being of opinion that even in all the circumstances it was reasonably practicable to report it before 5.30 a.m.

They did not consider the point of reporting it to the detective constable colleague to have been seriously argued as reporting within the meaning of s. 25 and in any event regarded it as a personal conversation between friends and not an official contact from which official action would be expected to follow.

The appellant appealed by way of case stated.

Held: 1. Allowing the appeal in respect of s. 25(1) of the R.T.A. 1972: The justices were not entitled to take into account the appellant's failure to inquire at the house. The statute simply required the motorist to stop, and if required to do so by any person having reasonable grounds for inquiring, to give the specified details. A driver in such circumstances must wait a reasonable time at the scene as explained in *Lee v. Knapp* (1966) 131 J.P. 110; [1966] 3 All E.R. 961 but he was not obliged to seek out those people who may have the right to question him.

2. Dismissing the appeal in respect of failing to report: the justices were entitled to find that the conversation between the appellant and his colleague was as

between friends and hence to disregard it. As for reporting it three hours after the accident, it was not possible for the court to say that no reasonable bench of magistrates could reach the decision that this did not amount to reporting as soon as reasonably practicable. In that period the appellant had passed the scene at a time when others were present and as he was being driven he could have been driven to a police station. The duty was to report as soon as reasonably practicable and not as soon as reasonable — there was a difference.

Per curiam: It was not for the court to say how it would have decided the case on the facts but to say whether a reasonable bench could come to the conclusion the justices reached on the evidence before them.

Mutton v. Bates Q.B.D. **459**

Transport Act 1981 – s. 19(1) – penalty points – number to be endorsed – whether failing to stop after accident and failing to report same accident are "offences committed on the same occasion".

A motorist pleaded guilty to two offences under s. 25 of the Road Traffic Act 1972, namely failing to stop after an accident and failing to report an accident. The facts were not in dispute; the issue simply was whether the offences were committed on the same occasion so that points had to be ordered in respect of the offence attracting the greater number only or whether they were not so committed and points therefore for each offence should be ordered and aggregated. The justices held that as the first offence occurred at the time and place of the accident and the second at some later time and different places, the offences were not comitted on the same occasion and accordingly ordered points in respect of each offence. As the defendant already had three points on her licence, she fell within the provisions of s. 19(2) of the Transport Act 1981 and was disqualified for six months, five and four points respectively having been ordered for the present offences. She appealed by way of case stated to the Divisional Court.

Held: Common sense must be applied. On the one hand the offences were not both committed at the moment of the accident — there was a gap in point of time. On the other hand, in the context of the two offences the lapse of time was, although significant, not so great that the offences could in common sense be said to have been committed on different occasions. They were so closely connected with the accident and so similar in nature that it was proper to say that they were committed on the same occasion within the meaning of those words used in s. 19(1) of the Transport Act 1981.

Per curiam: to hold otherwise, a disproportionate result would occur, as the minimum for these offences would be nine points compared with 10 points for reckless driving, for example, and if the middle number of points were imposed for each offence the total would cause the disqualification of the motorist under s. 19(2). Such a result would be extravagant.

Order for disqualification quashed — number of penalty points varied to five — applicant's costs from central funds.

Johnson v. Finbow Q.B.D. **563**

TOWN AND COUNTRY PLANNING

Planning Law – prosecution for non-compliance with a stop notice – whether defendant in criminal proceedings is entitled to attempt to establish that he is not in fact prohibited from carrying on the activities complained of in the stop notice – Town and Country Planning Act 1971, s. 90.

The appellant occupied certain land on part of which a caravan was sited. The land was used for the parking of lorries, the storage and hire of skips and the tipping of rubbish, and the caravan was used as an office. These activities were not covered by any grant of planning permission. The local planning authority served an enforcement notice on the appellant, who appealed against that notice to the Secretary of State for the Environment. In order to overcome the suspensive effect of the appeal, the local planning authority served a stop notice covering all the unlawful activities on the land. The appellant continued the parking of lorries and the storage and hire of skips. He applied for, and was granted, leave to apply for judicial review, but he did not actually make the substantive application.

The local planning authority commenced a prosecution for non-compliance with the stop notice. Having been committed for trial at the Crown Court, the appellant wished to argue that he had been undertaking the parking of lorries and the storage and hire of skips for more than 12 months, and therefore that he was entitled to the protection of s. 90(2) of the Town and Country Planning Act 1971 which provides that in certain circumstances (including those represented by the present facts), a stop notice shall not prohibit activities which have been carried out for more than 12 months. At the trial the Recorder, having heard the argument of counsel, held that the only way in which the validity of the stop notice could be challenged was by way of proceedings in the High Court and that accordingly the appellant had no defence to the criminal proceedings.

The appellant, having been convicted by the Crown Court, terminated the activities complained of and withdrew his appeal against the enforcement notice. He also appealed to the Court of Appeal against the conviction.

Held: the process of judicial review, which rarely allows the reception of oral evidence, is not suited to resolving the issues of fact involved in a case such as the present one. Furthermore, it is inappropriate to import into criminal proceedings the ways in which enforcement notices and stop notices can be challenged in civil proceedings. A criminal court is concerned with the guilt or otherwise of an accused person and not with whether a notice should be declared valid or invalid or be quashed. Accordingly, the appeal would be allowed and the conviction quashed.

R. v. Jenner C.A. 239

Planning Law – whether enforcement action can be taken against trespassers – power of defendant in criminal proceedings to challenge validity of enforcement notice – immateriality of incorrect description of recipient of copy of enforcement notice – Town and Country Planning Act 1971, ss. 87, 88, 89 & 243.

The respondents, who were brothers-in-law, lived in three caravans with their respective families. The caravans were stationed, without the benefit of planning permission, in a layby belonging to the local highway authority. The appellant local planning authority issued an enforcement notice in respect of this contravention of planning control and copies were served on the respondents, who failed to comply with the notice. Following a prosecution under s. 89(5) of the

Town and Country Planning Act 1971, the justices convicted the respondents of failing to comply and fined them, but the Crown Court allowed their appeal on the basis that they were squatters and that accordingly proceedings under the Town and Country Planning Act were wholly inappropriate. On appeal to the Divisional Court:

Held: (a) an offence under s. 89(5) is committed by anyone who contravenes an enforcement notice, whether an occupier, a squatter or some other trespasser; (b) a person in the defendants' position, having no right to appeal to the Secretary of State against an enforcement notice, must be able, to some extent, to challenge the validity of that notice in criminal proceedings; (c) if an enforcement notice wrongly describes squatters as being occupiers, this will not invalidate the notice; (d) in any event, the respondents were, on the facts, occupiers of the land in relation to the provisions of the Planning Acts; (e) there is nothing in the Town and Country Planning Act 1971 to prevent enforcement action being taken against persons other than those belonging to one of the classes referred to in s. 87(5).

The Crown Court was wrong to allow the appeal and the case must be remitted with a direction to restore the convictions and fines.

Scarborough Borough Council v. Adams and Adams Q.B.D. 449

Town and Country Planning – prosecution for non-compliance with enforcement notice – "continuing offence" – whether information bad for duplicity – Town and Country Planning Act 1971, s. 89.

The appellants, who were the local planning authority, served the respondents with an enforcement notice requiring steps to be taken to discontinue the use of certain premises for certain purposes. On failing to comply with the enforcement notice within the specified period, the respondents were prosecuted by the appellants. The information against each respondent alleged that that respondent had "on and since May 27, 1980" permitted the specified use in contravention of the enforcement notice, contrary to s. 89(5) of the Town and Country Planning Act 1971. Both respondents were convicted and both appealed to the Crown Court, where, for the first time, it was submitted that the informations used were bad for duplicity. The Crown Court allowed the appeals, being bound by the decision of the Divisional Court in *Parry v. Forest of Dean District Council* (1976) 34 P. & C.R. 200, where Lord Widgery, C.J.. had spoken of "a continuing offence" as being one which "repeats itself every day. In other words, a new offence is created every day".

On appeal by the local planning authority to the Divisional Court, that court also considered itself bound by *Parry's* case and accordingly formally dismissed the appeal but gave leave to appeal to the House of Lords. On appeal:

Held: *Parry's* case was wrongly decided and the appeal should be allowed. It is not an essential characteristic of a criminal offence that any act or omission, in order to constitute a single offence, should take place once and for all on a single day. On the present facts, each respondent had committed a single offence which had taken place over a period of time. However, although there was no valid objection to the informations in the present case, it might be preferable in future cases if such offences were charged as having been committed between two specified dates.

Hodgetts and Another v. Chiltern District Council H.L. 367

SHOPS

Sunday Trading - meaning of "closed for the serving of customers" on Sunday - Shops Act 1950, s. 47.

The two respondents were jointly operating a business of designing purpose-built kitchen units and the business was carried on from premises consisting of a showroom and a workshop. Because of the nature of the units, the most that a customer could do on the respondents' premises would be to inspect samples and arrange a home visit. After measurements had been taken in the customers' home, an estimate would be prepared and the transaction (if any) would then take place.

The respondents' premises were open on a Sunday and the local authority laid two informations, one in respect of each respondent, alleging contravention of s. 47 of the Shops Act 1950. The justices dismissed the informations on the basis that the premises were open on Sundays for viewing, but not for the serving of customers, and that the taking of a customer's name and address as a preliminary to a home visit was not a "preparatory act" within the meaning of *Monaco Garage Ltd. v. Watford Borough Council* (1967) 131 J.P. 446; [1967] 2 All E.R. 1291. On appeal by the local authority:

Held: Following the decision of the Divisional Court in *The Council of the City of Manchester v. Camperlands Ltd.*, unreported, (March 22, 1982) it is important to bear in mind that s. 47 does not require a shop to be closed in all circumstances on Sundays, but only in relation to the serving of customers. There is a range of possibilities, so that for example where there is a sale of an article over the counter, there is clearly an infringement of the Act, whereas if there is simply silent viewing there is no infringement. Between these two extremes there is an area which must be very much within the discretion of the justices, taking into account all the circumstances of the case.

On the present facts the justices were entitled to find that the shop was not open for the serving of customers, and the appeal must be dismissed.

Council of the Metropolitan Borough of Bury v. Law and Cowburn Q.B.D. 540

TRADE DESCRIPTIONS ACTS

Trade Description advertisement defendant's failure to comply with promotional offer whether subsequent honouring a defence whether statement made recklessly s. 14 Trade Descriptions Act 1968.

The respondents were charged with offences contrary to s. 14 of the Trade Descriptions Act 1968, namely that in the course of a trade or business they recklessly made a statement which was false as to the provision of a facility. By an advertisement the respondents indicated that 20 feature films would be supplied by way of hire absolutely free to any person who agreed to hire a video recorder. This promotional offer was subsequently withdrawn, but this fact was not brought to the attention of the branch in question. The aggrieved consumer, having entered into a rental agreement, was initially only offered six video films for which he had to pay postage and packing. On complaint being made by a trading standards officer, the respondents honoured the offer by supplying the 20 films free of charge. The magistrates acquitted the respondents. On appeal:

Held: allowing the prosecutor's appeal, that the statement concerning the 20 tapes free of charge was clearly false; that a reasonable person, looking at the advertisement, could well have taken the view that "absolutely free" did not involve him in making any payment, whether by way of postage or packing, in order to receive the tapes and that statement was also materially false; that the subsequent honouring of the promotional offer was irrelevant, since one had to judge the accuracy of the statement at the time it was made; and finally, the statements were made recklessly, there being no finding of fact by the justices that thought had been given by the management as to whether or not there was any possible ambiguity.

Cowburn v. Focus Television Rentals Limited Q.B.D. 201

Trade description - motor vehicle described as having one owner - five persons registered as keeper - whether as matter of law magistrates had erred in holding no false trade description - Trade Descriptions Act 1968 ss. 2 and 3.

The second respondents were charged with an offence contrary to s. 1(1)(b) of the Trade Descriptions Act 1968, namely that in supplying or offering to supply a motor vehicle they described it as having one owner, when in fact the registration documents showed that five persons had been registered as keeping the vehicle during a five year period. It was established that the vehicle was owned by a leasing company throughout the five year period and the vehicle was leased to the various people mentioned in the documents. The justices accepted a defence submission of no case to answer on the ground that the description, namely "one owner" was not false as there had been one "owner" throughout. On application for judicial review:

Held: that as a matter of law the statement "one owner" was capable of being regarded as false where the evidence showed that five separate persons had been at various times to all intents and purposes the owner of the vehicle.

R. v. South Western Justices and Hallcrest Garages Ltd. Ex parte London Borough of Wandsworth Q.B.D. 212

Trade description - statutory defence - reasonable precautions and due diligence - s. 24 of the Trade Descriptions Act 1968.

The respondents were charged under s. 23 of the Trade Descriptions Act 1968 as being persons whose act or default caused the commission of an offence by a third party contrary to s. 1(1)(b) of the 1968 Act, namely the supply or offer to supply of an electric light bulb to which the word "safe" had been falsely applied. The respondents sought to rely on the statutory defence in s. 24 of the 1968 Act in that they had relied on information supplied by another person and that they had taken reasonable precautions and exercised due diligence to avoid the commission of an offence by themselves or any person under their control.

The respondents were importers of electric light bulbs and they employed a third party to purchase the bulbs on their behalf. They relied on the verbal assurance of the third party as to the quality of the bulbs. They themselves, at the time, did not test or sample the bulbs nor did they employ any person to carry out an independent test. The faulty bulb would have been discovered by testing with a megatester. The magistrates accepted that the statutory defence had been satisfied

and acquitted the respondents. On appeal:

Held: allowing the prosecutor's appeal, that no bench of magistrates, properly understanding the relevant law, could reasonably have come to the conclusion that the defence was established on the balance of probability. The respondents had no system of random sampling of their own, nor did they employ anyone to sample on their behalf.

Hicks v. Sullam Limited Q.B.D. **492**

Trade or Business – whether hobby amounts to trade or business – Business Advertisements (Disclosure) Order 1977 and Trade Descriptions Act 1968.

The respondent was charged with 16 contraventions of the Business Advertisements (Disclosure) Order 1977, made under the Fair Trading Act 1973 and two breaches of s. 1 of the Trade Descriptions Act 1968. The Order requires a business seller to disclose he is selling in the course of a business. The alleged breaches of the Order were that the respondent being a person seeking to sell goods, namely a motor vehicle, in the course of business as a motor car dealer caused to be published advertisements indicating that the vehicle was for sale and this was likely to induce consumers to buy the vehicle without making it reasonably clear that the vehicle was to be sold in the course of a business. The two alleged breaches of the Trade Descriptions Act 1968 related to false trade descriptions applied to motor vehicles in the course of a trade or business.

The respondent, who was employed full-time as a postman, carried out repairs and improvements to motor vehicles in his spare time and then sold them. Between April 1980 and the end of July 1981 the respondent had inserted a total of 21 advertisements in newspapers relating to eight different vehicles. The justices dismissed all the informations on the basis that the respondent's activity was merely a hobby and therefore did not constitute a trade or business within either the Order or the 1968 Act. On appeal:

Held: dismissing the appeal, that the justices had not misdirected themselves on the meaning of the words "trade or business" and the evidence was such that they were entitled to hold that the respondent was engaging in a hobby activity; consequently there was neither a breach of the 1977 Order nor s. 1 of the Trade Descriptions Act 1968.

Blakemore v. Bellamy Q.B.D. **89**